

NLWJC - Kagan

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**Counsel: Regulatory Working
Group 1995 [1]**

THE WHITE HOUSE

WASHINGTON

December 7, 1994

MEMORANDUM FOR THE VICE PRESIDENT AND REGULATORY ADVISORS

FROM: John H. Gibbons *JHG* and Sally Katzen *SK*

RE: Administration Position on Risk Legislation

As co-chairs of the ad hoc group on Risk, we convened a deputies' meeting of the Regulatory Advisors on November 23, 1994, to solicit thoughts on options for an Administration position on risk. We concluded that:

- It is likely that risk legislation will be passed during the upcoming session of Congress. (All indications are that such legislation will apply across the board.) Given the tenor and terms of the "Contract" language on risk, it is essential that the Administration participate in that process.
- It is also important to make clear to the American public that the Administration favors the use of risk analysis as a management tool and that we have taken a leadership position in this area. We should not permit ourselves to be painted as anti-data, anti-analysis, anti-risk.
- The model used by the Administration last year on "unfunded mandates," is a promising way to proceed. It included:
 - devising a set of general principles that would be signed off on at the highest level and used as a basis for negotiation.
 - offering our support for legislation that is consistent with our tenets (POTUS speech to NGA, etc.).
- In addition to developing and approving a set of risk tenets, we need to determine which tenets are sufficiently important as to indicate a veto if breached in legislation by the 104th Congress.

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- We should also develop a brief white paper that sets out the Administration's view on risk analysis in non-technical language. Intended for a broad audience, this paper would demonstrate our commitment to sound risk analysis.

We considered other options, all of which appear less attractive. These options were:

1. Opposing any legislation, on the ground that risk analysis is an analytic tool best implemented administratively. We concluded that this option would not be feasible, as legislation appears inevitable in the 104th Congress, and if we stand in opposition to any legislation, we risk being unable to influence its content.
2. Drafting our own legislation. While doing so might help us articulate language that we are willing to support, the amount of time it would take, the difficulty of getting someone to sponsor (and effectively advocate) it, and the danger of getting mired in issues of language at the expense of remaining focused on principles pose substantial drawbacks.
3. Buying into specific statutory language (such as Johnston II, Condit II, Waxman, Klein). We were reluctant to do so because this would lock us into specifics, taking away negotiating room, which we would need to have once the Contract language is introduced.

Additional work must be done on the tenets, but a draft is attached. This draft incorporates the comments of various White House and Executive offices. We have left it as a draft so that agency views could be incorporated before December 12.

We think it best to have agreement to this general plan of action before soliciting comments on the principles from the agencies. Therefore, please let us have any comments or suggestions by COB Friday, December 9.

Distribution:

The Vice President
The Director of the Office of Management and Budget
The Chair of the Council of Economic Advisors
The Assistant to the President and Chief of Staff to the
Vice President
The Assistant the President and Counsel
The Assistant to the President for Domestic Policy
The Assistant to the President for Intergovernmental Affairs
The Assistant to the President for Economic Policy
The Assistant to the President for National Security
The Assistant to the President and Staff Secretary
The Deputy Assistant to the President and Director of the
Office of Environmental Policy

DRAFT
12/7/94

RISK AND COST-BENEFIT ANALYSIS TENETS

1. **Agency Requirements from Executive Order:** In promulgating a significant regulation, an agency should be prepared to state that it has done the following:

- **Evaluate Appropriateness of Regulatory Solution.** An agency has clearly identified the problem it intends to address, assessed the significance of that problem, and determined that regulation is an appropriate means of solving, and is likely to solve, that problem.

- **Good Data and Analysis:** An agency has based its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and the consequences of, the intended regulation.

- **Benefits Justify Costs (measured both quantitatively and qualitatively).** An agency has assessed both the costs and the benefits of a regulation, including both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures that are difficult to quantify but are nonetheless essential to consider, and determined that the benefits justify the costs.

- **Cost-Effectiveness.** An agency has determined that the approach selected is the most cost-effective means of achieving its regulatory objective.

- **\$100 million threshold.** Legislation requiring risk and cost-benefit analyses as part of the regulatory process should be limited in application to regulations having an annual effect on the economy of \$100 million or more.

2. Specific Risk Requirements

- **Transparency/Explain Assumptions.** Risk analyses should explain the agency's assumptions, including who is being protected and why.

- **Appropriate Peer Review/Peer Review Plan.** Agencies should have a peer review plan for reviewing risk assessments and should make it available to the public. The plan should include criteria indicating which type of risk analyses will be subject to peer review.

- **Provide Meaningful Explanation of Risks, Including Relevant Comparisons.** Risk comparisons should be meaningful to the public and provide information relevant to the decision.
- **No Micromanagement.** The objective of any legislation should be to promote the transparent application of analytic methodologies that are suitable for the problem at hand, but should not prescribe particular methodologies, which are often case-specific and continually evolving.
- **Commensurability.** The amount of resources devoted to risk analysis and cost-benefit analysis should be commensurate with the significance of the regulatory decision to be made.
- **No Modification of Existing Law by Implication.** Risk and cost-benefit analysis requirements should not be construed to amend, modify, alter, or supersede the requirements of other statutory provisions.
- **Improve R & D.** Legislation should support research necessary to improve the development and implementation of risk analysis.

3. **No Judicial Review.** The objective of any legislation should be to improve the regulatory process, not to create unproductive paper record requirements or opportunities for litigation.



OFFICE OF THE VICE PRESIDENT
WASHINGTON

December 20, 1994

MEMORANDUM FOR THE REGULATORY POLICY ADVISORS TO THE PRESIDENT

DIRECTOR OF OFFICE OF MANAGEMENT AND BUDGET
CHAIR OF THE COUNCIL OF ECONOMIC ADVISORS
ASSISTANT TO THE PRESIDENT FOR SCIENCE AND TECHNOLOGY
ASSISTANT TO THE PRESIDENT AND CHIEF OF STAFF TO THE VICE PRESIDENT
ASSISTANT TO THE PRESIDENT AND COUNSEL
ASSISTANT TO THE PRESIDENT FOR DOMESTIC POLICY
ASSISTANT TO THE PRESIDENT FOR INTERGOVERNMENTAL AFFAIRS
ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY
ASSISTANT TO THE PRESIDENT AND STAFF SECRETARY
DEPUTY ASSISTANT TO THE PRESIDENT AND DIRECTOR OF THE OFFICE OF
ENVIRONMENTAL POLICY
ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS

FROM: ELAINE KAMARCK

SUBJECT: REGULATORY REFORM

The Vice President will hold the first regulatory review session on Wednesday, December 21 from 9:15 am - 10:15 am in the Ceremonial Office.

The subject of the meeting will be "cross-cutting issues and general regulatory approaches." Sally Katzen will chair the meeting.

Attached is a tentative schedule for the upcoming regulatory sessions with the Vice President.

PROPOSED MEETING SCHEDULE

*	December 21 (Wed.)	Cross-cutting issues & general approaches	OIRA
1.	January 3 (Tues.)	Risk, takings, and unfunded mandates	OIRA
2.	January 5 (Thurs.)	Customer service in the regulatory arena	OVP
3.	January 10 (Tues.)	Environment, energy, and other natural resources	OEP
4.	January 12 (Thurs.)	Financial institutions	NEC & CEA
5.	January 17 (Tues.)	Small business	OIRA
6.	January 19 (Thurs.)	Transportation	NEC
7.	January 24 (Tues.)	Information technology and regulation	OSTP
8.	January 26 (Thurs.)	Workplace safety, education, and labor issues	DPC
9.	January 31 (Tues.)	Food and drugs, and consumer product safety	DPC
10.	February 2 (Thurs.)	Health industry regulation	DPC
11.	February 7 (Tues.)	Technology regulation	OSTP
12.	February 9 (Thurs.)	Equal employment opportunity	WH Counsel
13.	February 14 (Tues.)	Science regulation	OSTP
[14.]	February 16 (Thurs.)	TBA	[]
15.	February 21 (Tues.)	Consensual and Info.Tech. issues summary	OVP
[16.]	February 23 (Thurs.)	TBA	[]
[17.]	February 28 (Tues.)	TBA	[]
18.	March 1 (Wed.)	Reprise	[]

Reg. work Group



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

December 20, 1994



MEMORANDUM FOR REGULATORY POLICY ADVISORS

FROM: SALLY KATZEN

SUBJECT: DECEMBER 21ST REGULATORY CROSSCUT MEETING

Here is the paper that has been prepared for the meeting tomorrow morning at 9:15 with the Vice President.

Distribution:

- The Director of the Office of Management and Budget
- The Chair of the Council of Economic Advisors
- The Assistant to the President and Chief of Staff to the Vice President
- ✓ The Assistant the President and Counsel
- The Assistant to the President for Domestic Policy
- The Assistant to the President for Intergovernmental Affairs
- The Assistant to the President for Economic Policy
- The Assistant to the President for National Security
- The Assistant to the President and Staff Secretary
- The Deputy Assistant to the President and Director of the Office of Environmental Policy

December 21, 1994
9:15 a.m.

**CROSS CUTTING ISSUES
AND
GENERAL REGULATORY APPROACHES**

The Cross-Cutting Subgroup has looked at various ways to improve some of the perceived deficiencies of the regulatory system. We do not assume that regulations are an evil intrusion on an otherwise idyllic world; rather, we assume that though some regulations are necessary and desirable, the current system for producing and implementing rules is broken and needs fixing.

The goals of the ideas presented below (like the goals of E.O. 12866) are to make regulation less costly, less intrusive, and more easily understood. The group also identified a number of initiatives (listed at the end of the paper) that could be included under the "Customer Service" rubric. We also identified two subgroups of the regulated community that deserve special consideration: State, local, and tribal governments and small businesses. Small business is the subject of another subgroup, and State and local issues will be discussed there as well.

The purpose of this paper is to discuss briefly a range of cross-cutting approaches that could be productive both in improving the regulatory process government-wide and in sending a message to the bureaucracy and the public that we will not be conducting business as usual. Because the regulatory system is wide-spread, multi-layered and legally-based, we specifically include ideas to reform and cut through the process of establishing regulations to create a more efficient and less complex and burdensome system.

Those items marked below with asterisks will be discussed at the first meeting; the rest at subsequent meetings.

- * 1. Use of Performance Standards
- * 2. Use of Bubbles/Marketable Permits
- * 3. Use of Audited Self-Regulation
- * 4. Use of Contractual Mechanisms
- * 5. Regulatory Budget
- 6. Use of Information in Place of Regulation

7. Reduce Barriers to Public Participation
8. Provide Incentives For Agencies to Review Existing Regulations
9. Streamline Paperwork Requirements
10. Waivers
11. Eliminate Statutory Deadlines
12. Federalism
13. Customer Service Proposals

1. Use of Performance Standards. "Performance standards" set objectives or goals to be met by those to be regulated. They find it contrasted to what is more commonly used at present -- less flexible "design" or "command and control" standards, which specify particular technologies or practices that must be used by those being regulated. Executive Order No. 12866 states that performance standards are preferable to design standards.

Pro:

- More cost-effective (greater benefits for a given level of costs or reduced costs for a given level of benefits) and less intrusive than inflexible design standards.
- Innovation is encouraged and rewarded.
- Regulatory objectives are made clear from the onset.
- Extends idea of "waivers" to every regulated entity.

Con:

- Difficult to measure compliance and thus to enforce.
- Difficult to articulate the regulatory objective.
- Those regulated may want design standards for protection against liability.
- May require extensive information collection or more frequent monitoring.

Current Uses:

- OSHA Permissible Exposure Levels (sets eight-hour averages for presence of specific chemicals in the workplace); DOT auto safety standards; Animal welfare rules; environmental air and water rules.

Potential Uses:

- Performance Standards could be used wherever performance can be measured (e.g., food safety; other environmental rules; hazard communications).

2. Bubbles/Marketable Permits: The "bubble" approach treats several sources of safety or environmental risk as if they were a single unit. It therefore frees a firm from having to concern itself with each particular source of risk or emissions, enabling it instead to use its resources most cost effective reduction in aggregate risks or emissions. The "marketable permit" approach represents an expansion of the bubble approach. It assigns each firm a specified level (or license, such as airline landing slots or fishing quotas) and authorizes firms below the specific level to sell their credits or excess licenses to another firm that finds it less expensive to purchase the credits or to use the licenses more efficiently).

Pro:

- More increases cost-effective.
- Encourages and rewards innovation.
- Greater flexibility in meeting performance standards; encourages firms to go beyond minimum compliance requirements.

Con:

- Difficult to determine equivalences and hence to measure compliance with bubbles and even more so with marketable permits.
- Difficult to allocate rights initially.
- May create "hot spots," where risks are concentrated disproportionately.

Current Uses: EPA adopted its "bubble" policy for air emissions from plants in 1980. EPA also allows "averaging" across truck engines for emissions of certain pollutants. DOT's CAFE standards for cars are another example. Takeoff and landing rights at congested airports can be traded and sold. Radio and television spectrum licenses are allocated through auctions. Market trading mechanisms helped reduce lead in gasoline. Individual Transferable Quotas are beginning to be used in fishery management. The Acid Rain trading program is a good example of this approach.

Potential Uses: Allow auto makers to treat individual vehicles as "bubbles" for safety from varied impacts; expand use in environmental regulations.

3. Self-Certification and Self-Regulation: Under self-certification schemes, firms certify that they have complied with applicable regulations (rather than having to obtain pre-approval from the regulator). Under self-regulatory schemes, individual firms in an industry form or use an existing association to set rules to which all members will adhere. This association will be charged with policing its members. Under either approach, government might audit the compliance of either individual firms or the intermediary private organization.

Pro:

- Self-certification (in lieu of preapproval regulations) reduces delay in making available life-saving or cost-saving products or technologies.
- Requires regulated industry to take greater responsibility for achieving the regulator's goals.
- Reduces bureaucracy by trimming the need for enforcement staff.
- Regulations are more likely to be more sensible and better tailored to the industry because they are designed by those who know the industry well.

Con

- Harm could occur before government auditors discover problems.
- Firms themselves may prefer the certainty of a pre-approval, command and control regime.
- Capture of the regulators by the industry is more likely.
- Anticompetitive problems (i.e., barriers to entry, collusion) could be created by bringing firms in an industry together.

Current Uses: Self-Certification: DOT auto safety regulation; consumer product safety (e.g., clothing flammability standards); tax payment. Self-Regulation: National Association of Broadcasters' self-regulation of commercial television practices; securities regulation (stock exchanges); HHS and NSF science research regulations, which require self-monitoring, self-investigations, and self-reporting by institutions that receive federal grants. Underwriters Laboratory certification on electrical appliances.

Potential Uses: Self-Certification as replacement for FDA medical device approval; USDA prior label approval; EPA permits for modifications of production processes in the electronics industry. Self regulation: nursing homes; seafood safety.

4. Use of Contractual Arrangements: Use contractual arrangements, such as insurance and enforceable contracts between the regulator and the regulated party, in place of direct regulation.

a. Insurance-based approaches: The government might refrain from direct regulation if the regulated industry obtained sufficient insurance against the harm the government wished to prevent. Insurers would have an incentive to monitor risks and insure that regulated entities reduced them to desirable levels. The government's role would be limited to making sure that a desirable level of insurance was purchased.

Pro

- Expands enforcement capacity by enlisting the resources of insurance and surety companies.
- Avoids unnecessary government intrusion in private industries.

Con

- May create barriers to entry for small businesses.
- Could increase the cost of doing business if surety company charges high premium or requires large collateral deposit. Some businesses may be vulnerable to price fluctuations in the insurance market.
- Insurers may be unwilling to accept innovative new technologies designed to diminish risks.

Current Uses: Oil tanker regulation; fire insurance; workers compensations; crop insurance, etc.

Potential Uses: RCRA

b. Enforceable Contracts in Place of Regulation: Agencies could be encouraged to use "enforceable contracts" as a way of assuring continued "good practices" by an industry (or for the "good actors" within the industry), instead of imposing regulatory requirements on the industry.

Pro

- Rewards good behavior; avoids imposing a burdensome regulatory scheme on industries that are behaving responsibly.
- Allows regulatory agencies to focus regulatory resources on problem areas, rather than requiring agencies to allocate resources to address de minimis problems.

Con

-- Agencies may lack legal authority to use and enforce "private" contracts requiring private firms to follow certain practices.

Current Uses: EPA is presently taking comments on this approach as part of its NPRM on the listing of certain wastes from the dye and pigment industry because of statutory requirement to consider plausible mismanagement.

Potential Uses: If it is acceptable for the dye and pigment industry, can be used for refineries and possible other industries.

5. Establish a Regulatory Budget: The total cost of agency regulations on the private sector would be capped. Each agency would then be limited in the amount of private costs it could impose on private parties through regulation. A variation would include a percentage reduction each year.

Pro:

- Would reduce the cost of regulations on the economy or would force agencies to find offsets for the cost of new regulations.
- Would force agencies to set regulatory priorities.
- Could encourage agencies to rewrite existing regulations in a more cost-effective manner.
- Agencies would have to defend their proposed regulations vis-a-vis those of other agencies.

Con:

- Does not take benefits of regulation into account.
- Difficulty in setting baseline and/or scoring. There is no way to verify actual regulatory spending by the private sector, and likelihood of accounting gimmicks is large.
- If done by legislation, would shift control over regulatory activity to Congress, thereby inviting micromanagement and frustrating Administration priorities.

6. Use of Information: Information disclosure may be used as a substitute for regulation. Providing information on a product or service, for example, would permit potential consumers to regulate their own behavior, rather than having the government decide for them by banning or restricting use of the product or service.

7. Reducing Barriers to Public Participation: A variety of internal government rules limit the ability of regulators to talk with those to be regulated. While these were issued for good reason to curb abuses ("smoke filled rooms") they now serve more as a barrier to meaningful communication between the rule-writers and the regulated. Consequently, important information is not exchanged and a disconnect has developed between the good intentions of rules and the practical realities of commercial life.

Two paths for improvement exist:

(1) Reduce current barriers -- (a) eliminate all administrative, pre-NPRM, ex parte rules; (b) repeal the Federal Advisory Committee Act (FACA), or carve out exemptions for State/local/tribal governments and/or for technical or scientific advisors. These would be accompanied by simple disclosure of when who met with whom about what (as in EO 12866).

(2) Encourage more consultation -- (a) encourage use of regulatory negotiation; (b) establish a consultation system based on the European model, where government, business, and interest groups meet to negotiate on an industry-wide basis an approach to a perceived problem.

8. Provide incentives for agencies to review existing regulations. Section 5 of E.O. 12866 requires the agencies to review existing regulations. Regrettably, little has been achieved to date. Two suggestions for improvement exist:

(1) Require each agency to respond within a specified period of time to a petition to eliminate a particular regulatory provision. Petitions that must be denied because a particular provision is required by statute could be transmitted to the relevant congressional committees.

(2) Agencies should periodically reexamine the costs and benefits of regulations that impose large costs and repropose rules where the actual costs and benefits differ markedly from those anticipated before the rule was promulgated.

9. Waivers: On any new legislation or reauthorization bill, grant the relevant agency or department head the ability to waive any provision of the new law if a State or local community is overburdened by unfunded mandate requirements, economic or social distress, or has an innovative proposal to improve an economic or social condition or a federal program. The waiver would be temporary and the community would have to provide a strategic plan.

10. Streamlining Paperwork: Many small businesses, local governments, and citizens know their Federal government primarily through its forms and reporting requirements. Because these are frequently unintelligible, duplicative, burdensome, annoying, or nonsensical, they are among the most often criticized aspects of the government. In fact, to many, paperwork is the Federal government. Streamlining government paperwork can be done through a number of means: (1) establishing a "paperwork budget" and reducing "burden hours" by a specific percentage; (2) reviewing individual forms and requirements to reduce and eliminate unnecessary forms and requirements; (3) using technology to make information more easily submitted and to make better use of information submitted. Other ideas include giving agency heads authority to waive information requirements if it can be demonstrated that certain information can be more effectively collected by another means or from another source.

11. Eliminate Statutory Deadlines. Seek legislation to eliminate or extend statutory deadlines.

12. Federalism Issues. A final crosscutting issue concerns the scope of federal regulatory authority and the role of State and local governments. In addition to asking whether government should regulate, we need to also scrutinize which level of government should do the regulating.

13. Customer Service Proposals:

- Require a political appointee in each agency to certify that he or she has read in its entirety each rule that is promulgated.
- Require each agency to establish an ombudsman.
- Encourage compliance rather than penalties:
 - o Prohibit agencies from appraising an employee's performance on the basis of the number of citations he or she issues.
 - o Give those who violate regulations notice and an opportunity to correct the violation before issuing a citation (exclude imminent health and safety risks).

TALKING POINTS FOR ABNER MIKVA

RE: TAKINGS

1. Republican contract legislation provides compensation for any agency action reducing property value by ten per cent or more. Under the bill, if a property owner submits a demand, the agency must stay its action, offer compensation and submit to binding arbitration if the owner rejects the offer.

2. This standard would radically change takings law and is a budget buster--both in terms of the compensation and bureaucracy.

3. We agree that administrative reforms, such as streamlining the permitting process and creating "one stop shopping," would be consistent with Administration reforms.

4. However, we are concerned that negotiating even for a milder bill would undermine environmental, health and safety regs. Over 30 state Attorneys General recently opposed takings legislation beyond Constitutional requirements.

5. The working group memo to the VP identified three options:

#1) President to oppose the Republican bill and call the takings issue a core issue;

#2) Use Cabinet officials to deliver opposition to Republican bill and reserve President until last moment;

#3) Engage Hill in dialogue about moderate bill.

THE WHITE HOUSE
WASHINGTON

December 21, 1994

MEMORANDUM FOR THE VICE PRESIDENT

CC: THE CHIEF OF STAFF

THROUGH: CAROL RASCO
KATIE MCGINTY

FROM: Paul Weinstein (DPC) Michael Davis (OEP)
Tracey Thornton (Leg) Peter Yu (NEC)
Sally Katzen (OMB) Marvin Krislov (Counsel)

SUBJECT: Takings Strategy

Prior to the midterm election, the working group on takings was grappling with the issue of whether the Administration should compromise on takings amendments to secure passage of the President's environmental agenda. The election has radically changed this situation. Takings, which is addressed in the House Republican "Contract", is likely to be a centerpiece issue in the next Congress. It should be noted that "takings" means different things to different people. "Takings" in the constitutional sense means any government "taking" of private property that invokes the Just Compensation clause and requires that the government compensate the property owner. The courts have historically determined the point at which this occurs. However, many proponents of "takings" or "private property" legislation attempt to provide for compensation well beyond that required by the Constitution or to impose onerous administrative requirements on regulatory agencies unrelated to constitutional requirements. The Republican "Contract", and most other legislation proposed (by both Republicans and conservative Democrats) in the past, falls into both categories.

The purpose of this memorandum is to outline options for responding to efforts to pass takings legislation. Option 1 recommends the President draw the line early against accepting legislative changes to takings. Option 2 differs mainly from Option 1 in that it proposes utilizing the Cabinet (in testimony, etc.) to deliver a strong message and hold the President's involvement (and veto threat) until the most strategic time. Option 3 is a quiet engagement approach that places a greater emphasis on engaging the Hill in crafting legislation and a communications strategy for developing a non-big government approach to protecting the legitimate rights of landowners from unreasonable takings while ensuring the ability of the Federal government to

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effectively protect the health and safety of our citizens and our natural environment. Option 3 does not assume the President can sustain a veto on takings legislation agreed to by Senate and House moderates.

Political Landscape

The takings issue presents a potentially difficult dilemma between sound policy and the potential reaction of the public to our position. Unlike unfunded mandates or risk legislation, aggressive takings legislation would do more than simply change the techniques used for funding and managing federal regulation; it would also alter almost 200 of years constitutional law. Tampering with constitutional requirements without a principled reason is hardly the type of legacy this Administration wishes to leave. On the other hand, the private property rights movement is strong and growing, and opposition to takings legislation without, at a minimum, changing the debate so that people see the legislation for what it really is, could cast the Administration as being unsympathetic to property rights. Providing an alternative means of addressing legitimate concerns of property owners would allow us to diminish this concern to some extent.

It is important to recognize that opposition to property rights legislation proposed is broad-based -- reaching well beyond the environmental community. Civil rights, religious, health care, consumer, labor, planning, sportsmen, and other groups are clearly on record opposing such legislation. Over 30 state Attorneys General recently wrote the Congress opposing takings legislation that goes beyond what the Constitution requires. The National Conference of State Legislatures have strongly opposed such legislation as well. It is not clear that these groups would oppose legislation to address the legitimate claims of property owners, but they clearly oppose measures as broad and intrusive as those discussed below.

Background

The Fifth Amendment of the U.S. Constitution states that "private property" shall not "be taken for public use without just compensation." In other words, if the government needs your land to build a public road or a hospital, the government must pay compensation. Whether a regulation results in a "taking" generally depends on a number of fact specific considerations, including the relative intrusiveness of the regulation, its economic effect on the property owner, and the owner's particular circumstances and investment-backed expectations. For any case where the landowner feels aggrieved, the Tucker Act and the U.S. Constitution guarantee such landowner the right to bring suit in the Federal Courts to seek compensation.

Those opposed to governmental, and particularly environmental, regulation have seized on and exploited the public's concern over protection of private property in an effort to thwart legitimate governmental action to protect the public interest. These efforts typically, and sometimes successfully, portray necessary regulation and protection of private property as mutually exclusive, which of course they are not. These "property rights" interests have grown into a powerful force composed of many organizations and backed by conservative think tanks.

The private property rights or takings debate has been brought to light in the past few years primarily in the context of the Clean Water Act Section 404 "wetlands" program and the Endangered Species Act (ESA). Many feel that these programs impose substantial and unnecessary burdens on landowners. It is important to remember that this Administration has developed a solid roadmap (not yet completely implemented) for improving the wetlands program and is currently in the process of developing a package of administrative reforms for the ESA.

The private property rights movement has been active legislatively at both the state and federal levels. Bills to advance the "private property" cause have been introduced in the majority of state legislatures, although so far they have been enacted in only a few states. In the Congress, many and varied bills have been introduced in both Houses. In general, the bills attempt to thwart environmental, health and safety regulation by at least raising the specter of requiring compensation as a result of virtually all governmental regulation, thereby making such regulation economically infeasible.

Major federal legislative efforts in the 103rd Congress include:

- Senator Dole/Heflin's legislation (S. 2006) to require complex takings analyses before a wide range of governmental action can take place. A version of this bill, improved by changes made by Senator Bumpers but retaining a problematic judicial review provision, was adopted as an amendment to the Safe Drinking Water Act in the Senate. The Dole legislation is cumbersome, but it is better than the "Contract" bill because it does not address the compensation issue.
- Representative Tauzin's proposal to provide compensation for any governmental action that diminishes the value of any piece or portion of property by more than 50%.

Republican "Contract"

The House Republican "Contract" bill is more extreme than any prior legislative proposals. The "Contract" would provide that property owners are entitled

to compensation for agency actions that reduce the value of property. This title would:

- Entitle property owners to compensation "for any reduction in the value of property owned by the property owner" that results from "a limitation on an otherwise lawful use of the property imposed by final agency action" and that "is measurable and not negligible." Reductions in the value of ten percent or more are deemed not negligible. The entitlement extends by express definition to "any interest in land" and "any proprietary water right."
- Require that if a property owner unilaterally demands compensation for a particular agency action, the agency must stay its action and make an offer to compensate the property owner for the diminution in the value of the property.
- Provide that if the property owner rejects the offer, the property owner may submit the matter for arbitration before a private arbitrator, whose decision is binding on both the agency and the property owner.

The budgetary impacts of this bill are considerable. Significant costs will be incurred not only from the costs of compensation, which might range into the tens of billions of dollars, but also from the costs of appraising, disputing, and arbitrating these issues whenever a demand for compensation is made. In addition, legislation will create a need for a new bureaucracy to respond to the flood of requests for permits and other regulatory rulings. Finally, there are constitutional questions as to whether Congress can remit the adjudication of statutory or constitutional rights to a private person.

Strategy for the Next Congress

The working group looked at a range of options aimed at resolving the takings issue. It is the opinion of all the members of the group that takings legislation has the greatest potential to damage the Administration's ability to protect public health, safety, and the natural environment. We have narrowed the list of options down to three. All three options agree with respect to the desired substantive outcome. All offices agreed that the President should be prepared to veto any legislation that requires compensation to property owners beyond that required by the Just Compensation Clause of the Constitution, and that less extreme legislation consistent with the attached principles should be acceptable to the Administration.

In addition, all offices strongly endorse developing a coordinated communications strategy designed to change the debate on takings, and believe that such a strategy is key to holding off extreme takings legislation. Using the model

that defeated the Arizona takings proposition in November, we would work to develop a coalition of sportsmen, religious groups, mayors and governors, environmentalists, and public health advocates who are opposed to changing the takings law for different reasons. Attached (attachment 2) is a draft strategy developed by OEP which they plan to discuss with interest groups subject to your approval.

The difference between the options lies essentially in the degree to which the Administration, and particularly the President, become engaged in the debate on this issue. Option 1, proposes that the President identify this issue as a "core" issue, and be actively engaged in the debate including an early and public veto threat. Option 2 is essentially the same as Option 1 except that it recommends that the cabinet secretaries lead the attack against the "Contract" takings legislation and delay the threat of a Presidential veto until the appropriate time. Option 3 proposes that the Administration work quietly with its friends on the Hill to craft an acceptable legislative alternative to the "Contract", but that the Administration not publicly engage on the issue.

Option 1: Draw The Line

Several members of the working group believe that of all the "trinity" regulatory issues, changes to the takings law is one legacy this President does not want. They support a riskier, but perhaps bolder, strategy. Proponents of this option propose the President identify the takings issue as a "core issue" and pro-actively exploit the radical nature of the Contract bill. In particular, they propose that the President

- State that he supports sound unfunded mandates, risk, and cost-benefit legislation, but believes that the takings bill is unwise as a matter of governance and unsound as a matter of law;
- Adopt a public position against the Contract bill and emphasize that the bill represents:
 - an unjustified corruption of two centuries of constitutional jurisprudence; and
 - an extreme measure designed to end government as we know it--writing the final chapter of the Reagan-Stockman dismantling of government; and
- Proceed administratively (aggressively), including either modifying or augmenting the Reagan Executive Order so that it appears stronger.

- Threaten to veto any takings bill, such as the one included in the "Contract", that fundamentally changes the takings jurisprudence so carefully developed by the Founders and the Supreme Court.

Analysis

As the Republican Contract makes clear, the regulatory issues may be defining issues for the Administration and the next election. Accordingly, we face a critical strategic choice: does the President pursue compromise and damage control, or does he stake out an aggressive position. Both approaches have familiar weaknesses: a compromise strategy may engender criticism that "no one knows what the President stands for" and afford the President no credit from either side. An aggressive position could force a politically difficult veto (and possible override) if the legislation is not substantively changed and the debate is not recast according to the communications strategy.

Option 2: Modified Draw The Line

Proponents of this approach believe that it is vital for the Administration to engage fully in the debate over takings legislation -- including the President at the appropriate time. In this regard, some of the group believe that Option 1 should be modified as noted below:

- We must first agree on a set of principles (Attachment 1) which clearly outline the Administration's position. The principles should be clear to all on where we draw the line -- the President should veto any legislation that provides compensation beyond the levels required under the current law and the Constitution.
- In early to mid-January, the Cabinet Secretaries and Assistant Secretaries should mount an aggressive campaign against the "Contract" takings proposal. Using the principles noted above, we should tell the public how bad the bill is -- more red tape, more litigation, reduced protection of public health and safety and the environment, and it is a budget buster. In addition, we should publicize the Administration's initiative to provide regulatory relief to the small landowner. For example, we can package a fairly impressive list of reforms for the wetlands and endangered species programs. Further, we could advocate legislative reforms to the judicial takings process that would reduce the expense and delay experienced by small landowners.
- At the appropriate time the President and the Vice President should speak unequivocally about the issues raised in the "Contract" on takings. The President should make clear his commitment to the protection of property rights while saying

the "Contract" bill simply goes too far and will be bad for the middle and working class Americans. The timing of the President's involvement should be discussed further. The major point here is that unlike Option 1, we do not believe the President should come out immediately with a veto message on takings nor issue an Executive Order. Rather we should use our Cabinet (in testimony, etc.) to deliver a strong message and hold the President's involvement until the most strategic time.

As previously discussed in this memorandum, proponents of this approach believe that a well coordinated communications strategy designed to change the debate on takings is vital. Substantial support should be generated to support the Administration's position on takings.

Analysis

Same advantages as Option 1 but with the additional one of providing some flexibility on the Presidential veto threat. This approach requires the White House to effectively coordinate a successful communications strategy. Outside interest groups are already gearing up to respond to Republicans and others on takings legislation.

Option 3: Quiet Engagement

Statement Of Principles

Using last year's unfunded mandates strategy as a model, the working group has developed a statement of principles that could guide the Administration's position in relation to compromise legislation (Attachment 1). The principles set forth the Administration's strong and unwavering commitment to protecting private property rights and our recognition that landowners (emphasis on small property owners) must often follow time consuming and expensive procedures when challenging a government decision on a Federal permit or making a claim of a constitutional taking of their property. The principles also propose some general administrative and legislative changes to address any property owners' legitimate concerns with the process. Under this option, these principles will not be made for public consumption but are instead designed to help guide the Administration in its negotiations with the Hill and to provide guidelines for the agencies. Selected sections of the principles may be shared with advocacy groups with whom we will be working to develop a communications strategy.

Advocates of this strategy believe that the key to moderating takings legislation coming out of the Congress lies in a behind the scenes dialogue with key moderates in the Senate, which is traditionally more bipartisan than the House and

where the filibuster provides the minority leadership with some additional leverage. We have already had some preliminary discussions with the staff of Senators Bumpers and Baucus. They indicated a desire to work with us quietly on developing a reasonable alternative bill to the "Contract" put forth in the House. Senator Bumpers worked with Majority Leader Dole on legislation last year which we may very well have to accept in some form. It is the strong recommendation of the working group that the President should veto any legislation that provides compensation beyond the levels permissible under current law (Bumpers' and Baucus' staff concur.)

Over the next two weeks Bumpers' staff will be conferring with the staff of the new Senate Majority Leader to see if they can come to some general agreement. Senator Baucus will do the same with Senator Chafee. Since Senator Heflin, who cosponsored the Dole bill last year, is the ranking minority on the Judiciary Committee Subcommittee to which takings legislation will be referred and is up for reelection in 1996, we will confer with his staff shortly. We have also had preliminary discussions with Senators Daschle and Glenn's staff. Daschle's staff favors the attempt at compromise approach and plans to talk to Baucus and Bumpers. Glenn's staff reluctantly concede probable defeat and plan to talk to Kennedy and Moynihan's staffs. We plan to meet with Bumper's and Baucus' staff in approximately a week and provide them with our principles pending your approval.

This group also recommends reconvening the working group of Democratic Senators that was put together last year by White House Legislative Affairs. This group includes the staff of Senators Biden, Bumpers, Baucus, Breaux, Nunn, Johnston, Conrad, Daschle, Glenn, and Hollings.

If Bumpers' is unable to reach a compromise with Dole, we will need to assess our strength to sustain a veto in the Senate and work with the Democratic leadership to develop some amendments that may siphon off a few Republicans while holding the Democrats.

The key difference between this approach and Options 1 and 2 is that we believe a veto message by the President or a cabinet-led attack against the takings language in the "Contract" could be counterproductive.

Analysis

While there are advocates within the Administration on both sides of the debate on unfunded mandates and risk/cost-benefit analysis, we could find no one within the EOP or agencies who support changing takings law -- except for some administrative improvement to help small property owners get expedited

consideration. In addition, compromise legislation, which will be difficult to agree on, may feed the criticism that "no one knows what the President stands for." On the other hand, many believe that the takings/private property debate resonates much more strongly with the American people than either unfunded mandates or risk, and therefore, we should not put the President in the position of having to oppose takings legislation.

Recommendation

The working group on takings could not reach a consensus position.

Decision

Option 1

Option 2

Option 3

Discuss Further

Attachment 1

PROPERTY RIGHTS STATEMENT OF PRINCIPLES

The Clinton Administration has been, and continues to be, a champion of the rights of the Nation's landowners. The President firmly believes that private ownership and use of property is a cornerstone of this country's heritage and tradition -- as well as our economic strength.

The President and his Administration are committed to ensuring that Federal programs do not impose unwarranted burdens on landowners. In this regard, the Administration will redouble its efforts to take administrative action to make regulatory programs more fair, flexible, and efficient. Further, the Administration will work with the Congress on legislation that addresses legitimate concerns without sacrificing effective protection of human health, public safety, and the environment.

At the same time, the President is concerned that "property rights" legislative proposals currently being considered inappropriately inhibit the ability of Federal, State, and local governments to effectively protect the health and safety of our citizens and our natural environment; and result in more bureaucracy, more red tape, and increased taxes -- an inequitable result for middle and lower-income families and individuals. Further, such proposals create what is essentially a "bad neighbor" policy -- where neighbors will have to fight it out among themselves to protect their property.

The following principles will serve as a guide for the Administration in its discussions with Congress, interest groups, and the public. These principles cover a range of specificity from general Administration positions to specific programmatic reforms for wetlands and endangered species programs.

Private Property Rights Principles

- 1) **The Clinton Administration firmly believes that private ownership and use of property is a cornerstone of this country's constitutional heritage and historical tradition, as well as its economic strength.**
- 2) **The Fifth Amendment to the Constitution provides that private property shall not be taken for public use without just compensation.**
- 3) **The Clinton Administration recognizes fully its obligation to ensure that the requirements of the Just Compensation Clause of the Constitution are fulfilled at all times by making it clear that all executive branch agencies have a fundamental responsibility to protect property rights and to ensure that landowners are free from unwarranted burdens on private property. Agencies will continue to assess the impacts of their activities on private property.**
- 4) **The Clinton Administration recognizes that many government actions affect private property in some way -- often the value of the property will be enhanced and sometimes the value of property will be diminished.**
- 5) **The Clinton Administration recognizes the importance of Federal, State, and local government programs that protect the Nation's health, safety, and environment. In most cases these programs are working in harmony with landowners and many of the negative perceptions concerning property rights are not consistent with the facts. For example, approximately 95 percent of all Federal wetland permits are issued.**
- 6) **The Clinton Administration recognizes that landowners must often follow time consuming and expensive procedures when challenging a government decision on a Federal permit or making a claim of a constitutional taking of their property. Accordingly, the Administration will respond through administrative action where possible and work with the legislative and judicial branches to streamline regulatory and compensation procedures for**

landowners. Such action will include, but will not necessarily¹ be limited to the following:

- *Establishment of a small landowner assistance office to provide information to property owners on regulatory procedures and requirements and on the procedures for filing a claim for compensation for an alleged taking. The office will review complaints and advocate to the relevant agency or department in favor of those which they believe have merit;*
- *Streamline procedures for landowner compensation where the government and the landowner are in agreement that a Federal action has resulted in a regulatory taking;*
- *Establishment of an administrative appeals process for landowners who are denied permits under the wetlands rules. This streamlined process will allow landowners to challenge permit decisions without the expense and time required if they go to court -- currently a landowner's only recourse;*
- *Establishment of an administrative appeals process for landowners that disagree with wetlands jurisdiction decisions. This will provide significant relief for landowners who under the current system can challenge a jurisdictional determination only after applying for a permit and going to court;*
- *To increase predictability and reduce delays, establish deadlines for making permit decisions;*
- *Simplify the permit application process by creating across agencies one application for small property owners and a one-step process for applying;*
- *Base Endangered Species Act (ESA) decisions on sound science by requiring formal, independent scientific peer review of all proposals to list species and all draft plans to recover species;*
- *Give people quicker ESA answers and greater certainty by: speeding up the permitting process for low impact activities, making compliance*

¹ Many other wetlands and Endangered Species Act reforms may be possible and are currently under consideration.

inexpensive and quick for small-scale activities; identifying at the outset activities on private lands that are compatible with the ESA, so as not to tie up land use and development unnecessarily; providing certainty to landowners who participate in conservation planning, and protecting them against later demands for additional mitigation and payments;

- *Treat private landowners more fairly by: facilitating economic use of private land by acquiring additional habitat to be protected, from the military when bases are closed, by enrolling existing federal lands in habitat reserves, by arranging for purchases of RTC lands, etc.; creating presumptions in favor of economic use of land by private owners whose activities create only negligible impacts on ESA listed species; creating presumptions in favor of economic use of land by individual homeowners, and small tract, low impact activities;*
- *Providing incentives to landowners who voluntarily agree to enhance habitat on their lands by insulating them from restrictions if they later need to bring their land back to its previous condition.*
- *Setting priorities in the listing of species to ensure that public and private resources are used as efficiently and effectively as possible.*

7) The Clinton Administration will work with the Congress to ensure that individual property rights are protected and that the legitimate interests of the public are not diminished. In this regard, the Clinton Administration will support property rights legislation that is consistent with the above principles.

8) The Clinton Administration will not support legislative proposals that establish unnecessary requirements for compensation that go beyond what is required by the Constitution or inhibit the ability of Federal, state, and local governments to protect the health and safety of our citizens. Current legislative proposals, including the Contract with America legislation, could adversely affect:

- *ZONING LAWS, including those that prevent the establishment of an adult bookstore next to the neighborhood school or church;*

- *WORKER HEALTH AND SAFETY LAWS, including those that require employers to protect employees from safety and health hazards in the workplace, as well as child labor laws;*

- *ENVIRONMENTAL LAWS, including those that prevent landowners from storing barrels of toxic waste near a neighborhood or by a school.*

- *CIVIL RIGHTS LAWS, including those meant to halt unfair housing practices or job discrimination;*

9) The Clinton Administration will not support legislation that establishes arbitrary thresholds for compensation beyond which is required by the Constitution. Further, such an approach:

- *creates a bad neighbor policy and unnecessary layers of wasteful bureaucracy, more red tape and more litigation. It would be unjust to compensate landowners who cause pollution and/or devalue their neighbors property.*

- *is a needless budget buster -- paying polluters and potentially costing taxpayers billions;*

- *raises significant constitutional concerns.*

Attachment 2**COMMUNICATIONS STRATEGY****Define the Debate**

The primary goal is to ensure that the Republican Contract's takings clause does not slip through under the radar screen. Environmental agencies and NGO's are currently doing research to help with this. Most energies will focus on clearly defining 10-30 specific examples that show how bad this clause is (creating "poster children" that can compete with the poster children the Wise Use movement has created).

One such example: It will be impossible to enforce SMCRA, meaning rivers will again run orange in Appalachia and the health of children (not to mention the property values of their parents) will be in decline.

Another example: FERC will have difficulty moving in any direction on licensing power lines. If they refuse to grant a license, the power generator will file a claim. And if they do grant a license, those homeowners whose property abuts the transmission line corridor will file claims of their own.

Once this research is further along, the community will start a series of events that show the impact of these examples. The events will be visual and will involve real folks. If the stories are compelling enough -- and they will be -- they will take on lives of their own.

Outreach to Other Constituencies

The environmental community and agencies believe it's best to have a spokesperson other than an environmentalist leading this effort. This strategy was used in defeating Arizona's takings legislation by 60 percent. The debate is more likely to be won if people realize this is a raid on the Treasury and an attack on the public's health and safety. The environmental NGO's have begun to meet with other constituencies -- for example, they recently met with AFL-CIO officials.

This process needs to take place inside the Administration as well. The Departments of Labor and Justice and the Office of Management and Budget, for example, may have the best examples of the horrible impact the takings clause would have. Each department needs to be doing the same kind of research that the environmental agencies have undertaken.

Mobilize the Grass Roots

A fairly significant effort is underway by the environmental community to build alliances with more local groups. These would include neighborhood associations, local planning organization, etc. There is some possibility that money might be raised for a separate media and organizing campaign -- targeted specifically at the takings issue.

Important
Reg. Reform



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

JAN 2 1995

MEMORANDUM FOR THE REGULATORY ADVISORS AND AGENCY REGULATORY
REFORM WORKING GROUP

FROM: Sally Katzen

RE: Meeting on Cross-Cutting Regulatory Issues

Attached please find the agenda and briefing paper for the continuation of the regulatory cross-cut meeting (date and time to be announced). Please call if you have any comments or questions.

**CROSS CUTTING ISSUES
AND
GENERAL REGULATORY APPROACHES**

Second Installment
January 5, 1995

The approaches discussed below are those on the list distributed for the December 21st meeting that were not discussed at that meeting; you may recall we have already touched on performance standards, bubbles/marketable permits, audited self regulation, contractual mechanisms, and (briefly) regulatory budget. For purposes of our further consideration, we suggest the following order:

1. Enhance Public Participation
2. Streamline Paperwork
3. Provide Incentives to Review Existing Regulations
4. Revisit Federalism Issues
5. Eliminate Statutory Deadlines
6. Use of Information
7. Introduction to Customer Service Issues

1. Enhance Public Participation: A variety of laws and rules limit the ability of regulators to talk with those to be regulated (or those intended to benefit from the regulation). While these restrictions were imposed for good reason to curb abuses ("smoke filled rooms"), they now often serve more as a barrier to meaningful communication between the rule-writers and those affected by the regulation. Consequently, important information is too often not exchanged, creating a gap between the good intentions of rulewriters and the practical realities of life.

Two paths for improvement exist:

(1) Reduce current barriers

(a) Eliminate all administrative, pre-NPRM, ex parte rules; and

(b) Seek repeal of the Federal Advisory Committee Act (FACA), or carve out exemptions for State/local/tribal governments, for scientific or technical advisors, or for operations or mechanical advisors or consultants.

Any (all) meetings would be accompanied by simple disclosure of when who met with whom about what (as in E.O. 12866).

Pro:

- E.O. 12866 calls for vetting proposals with those affected, but agencies claim their rules preclude them from doing so.
- Would provide reality check and might produce better way to do the regulation.
- Would reduce adversarial relationship in rulemaking.

Con:

- Would encourage suspicions of undue influence by big business.
- These "sunshine" provisions were advocated by Democrats and strongly supported by Democratic constituencies.
- Consultation can be time consuming and expensive.

(2) Encourage more formal consultation

(a) Select several high-profile regulatory negotiations;

(b) Establish a consultation system based on the "European model," where government, business, and

interest groups meet to negotiate on an industry-wide basis an approach to a perceived problem.

Pro:

- Leads to better understanding of the issues
- Those who participate in developing solutions more readily accept and support them
- Reduces adversarial environment

Con:

- Heavy up-front costs (both in time and resources)
- Sunshine can lead to posturing and confrontation
- Difficult to find/fund representatives of the public

Current Uses: Numerous agencies have made efforts to reach out to stakeholders (see E.O. 12866 One-Year Report, pp. 14-23 for examples).

Potential Uses: Virtually all regulations could be improved with earlier consultation with affected parties and with reality check in final stages. A super reg-neg could be convened to deal with a particularly controversial regulatory issue (e.g. ergonomics, etc.) to highlight responsiveness to concerns.

2. Streamline Paperwork: Many small businesses, local governments, and citizens know their Federal government primarily through its forms and reporting requirements. Because these are frequently unintelligible, duplicative, burdensome, or annoying, they are among the most often criticized aspects of the government. In fact, to many, paperwork is the Federal government.

Streamlining government paperwork can be done through a number of means:

(1) Establishing a "paperwork budget" and reducing "burden hours" by a specific percentage (the theory underlying the Paperwork Reduction Act);

(2) Giving agency heads authority to waive information requirements if it can be demonstrated that certain information can be more effectively collected by another means or from another source;

(3) Precluding incorporation of the actual form in rules so it can be modified without full notice and comment procedures.

(4) Using technology to make information easier to submit and to make better use of information submitted.

Pros

- Addresses a major public complaint about government.
- Reduces costs and burdens, particularly on small businesses.
- Facilitates changes based on experience, changed circumstances, etc.

Cons

- Percentage reduction is arbitrary.
- Information is needed for compliance and enforcement.
- If form is not in rule, question may arise about enforceability.
- Not all regulated entities are computerized.

Current Uses: The Paperwork Reduction Act gives some authority to OIRA for (1) and (4), but there has been no higher level reinforcement. Some agencies routinely follow (3).

Potential Uses: All agencies could take paperwork burden more seriously.

3. Provide incentives for agencies to review existing regulations:

Though "lookbacks" -- reform of current regulatory programs -- are included in Section 5 of E.O. 12866, it has proven more difficult than we would have anticipated for agencies to undertake these time consuming, generally thankless tasks. (See One-Year Report, chapter IV.) New incentives for re-engineering of current programs are necessary, particularly in a time of reduced resources.

Two approaches have potential:

(1) Require agencies to respond within a specified period of time to any **petition** (that includes specified information) to eliminate a particular regulatory provision. Petitions that must be denied because a particular provision is required by statute would be transmitted to the relevant congressional committees.

Pro

- This would encourage private parties to identify rules that impose unjustifiable costs on society.
- This would present Congress with potentially valuable information about ineffective regulatory statutes.
- This would further the idea of an accountable government, open to petitions from its citizens.

Con:

- The agencies might be overwhelmed with paper.
- Agencies' priorities (and use of limited resources) would be driven by special interest (petition writing) groups.
- Could raise expectations that cannot be realized.

(2) Agencies should periodically **examine** the costs and benefits of regulations that impose large costs and **repropose** rules where the actual costs and benefits differ markedly from those anticipated before the rule was promulgated.

Pro

- Would ease the burdens caused by inefficient regulations
- Would provide analytic data to improve techniques of estimating costs and benefits for future rules

Con:

- Would require use of agency resources, taking some away from the development of new regulations.

-- Would introduce additional controversy over selection of test cases.

Current Uses: Department of Treasury answers all correspondence with set time limit; Department of Transportation has done review of past rules without the reproposing piece.

Potential Uses: Each agency could choose (1) or (2) or a pilot project area within (1).

4. Revisit Federalism Issues. In addition to asking whether government should regulate and how it should regulate, we need also ask who --which level of government-- should do the regulating. In some cases, Congress has--for political reasons-- felt obliged to address problems that are best addressed by States or localities. Conversely, in some instances, state and local governments have maintained partial control over areas better regulated solely by the central government.

These judgments should be revisited, particularly in light of larger trends shaping our economy and polity. Just as the functioning of markets may improve and render regulation obsolete, so the regulatory capacities of state and local entities may improve and render federal regulation unnecessary. And, in sectors in which concurrent federal and state regulation once made sense, the globalization of the economy may now support a preemptive federal role.

The justifications for federal regulation are familiar:

- to ensure certain national values and objectives, such as the protection of civil rights.
- to control externalities, such as interstate flows of pollutants;
- to secure economies of scale, such as through investments in research;
- to establish uniformity, where essential for interstate or international commerce;
- to minimize collective-action problems, such as a deregulatory "race to the bottom" among the States; and
- to redistribute resources among States or regions.

So too are the justifications for leaving regulation to state, local, and tribal jurisdictions:

- to enhance local control and public participation;
 - to improve efficiency by tailoring solutions to local needs;
- to encourage experimentation with different regulatory methods and goals.

Consider three suggested approaches:

- (1) Convene **summit** of Federal and State regulators in particular sectors to consider reallocating roles.
- (2) Require each agency to **nominate an area for devolution** to the states. Examples previously discussed include de-federalizing Superfund and Safe Drinking Water, where the federal role could be limited to cost-sharing and technical assistance.

- (3) Provide authority for the head of an agency to grant **waivers** -- on a priority basis -- of any provision of the new law if a State, local, or tribal community: (1) was overburdened by unfunded federal requirements; (2) suffered from economic distress as measured by poverty, outmigration, joblessness, etc., or social distress; or (3) developed an innovative proposal to improve an economic or social condition or a federal program. Communities would have to provide a strategic plan which would describe the purposes for the waivers and a timetable with a sunset date of the waiver. These waivers would be temporary and would not be subject to judicial review.

5. Eliminate Statutory Deadlines: During the last decade, Congress has increasingly specified the time for issuing regulations, often without regard for the complexity of the task or the other priorities of the agency. We could seek legislation to eliminate or extend statutory deadlines for rulemaking proceedings.

Pro:

- Agencies would be able to set priorities, rather than being driven by statutory and judicial deadlines.
- Good science and good analysis would not be squeezed out by arbitrary deadlines.

Con:

- There would be little basis for forcing action unreasonably withheld by an agency.
- Some issues can be analyzed forever.

Potential Uses: EPA is now largely driven by statutory deadlines. Department of Education has also lived with very tight limits. Both would produce "more sensible" rules with more time.

6. Use of Information: Information disclosure may be used as a substitute for regulation. Providing information on a product or service, for example, would permit potential consumers to weigh risks for themselves, rather than having the government do it for them by banning or restricting use of the product or service.

Pro:

- The public rather than the government makes decisions regarding products and services.
- Less costly than traditional regulation.
- Faster to implement and to modify in response to changing circumstances.
- Could utilize modern technology for electronic dissemination of information.

Con:

- Assumes literate and educated consumer.
- Information must be carefully presented in a way that is easy to understand and useful to consumer decision-making.
- Mandatory information dissemination can be a form of burdensome, command-and-control regulation. If voluntary, information may lack uniformity or accuracy.
- May burden small entities disproportionately.

Current Uses:

- Food labeling provides uniform nutritional information for consumers, as well as food content labeling; safe food handling labels for fresh meat and poultry; fair packaging standards; textile/wool/fur content and care labeling on clothing; energy efficiency labeling; domestic content and country of origin; automobile fuel efficiency; drug information inserts.

Potential Uses:

- Provide information to and educate workers about repetitive stress syndrom rather than require compliance with design standards; improve food content labeling and eliminate food "standards of identity."

7. Introduction to Customer Service Issues: Regulators are notorious for not being customer friendly. This custom must change. Some modest proposals:

- o Require a political appointee in each agency to certify that he or she has read in its entirety and understands each rule that is promulgated.
- o Require each agency to establish an ombudsman to be available to those with questions or complaints.
- o Encourage compliance rather than penalties:
 - Prohibit agencies from appraising an employee's performance on the basis of the number of citations he or she issues [see recent DOL changes]
 - Give those who violate regulations notice and an opportunity to cure the violation before issuing a citation (exclude imminent health and safety risks)

104TH CONGRESS
1ST SESSION

H. R. 9

To create jobs, enhance wages, strengthen property rights, maintain certain economic liberties, decentralize and reduce the power of the Federal Government with respect to the States, localities, and citizens of the United States, and to increase the accountability of Federal officials.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1995

Mr. ARCHER, Mr. DELAY, Mr. SAXTON, Mrs. SMITH of Washington, and Mr. TAUZIN (for themselves, Mr. HASTERT, Mr. DORNAN, Mr. ROHRABACHER, Mr. BLUTE, Mr. SMITH of Texas, Mr. LINDER, Mr. KIM, Mr. MICA, Mr. BACHUS, Ms. DANNER, Mr. HOKE, Mr. CLINGER, Mr. BALLENGER, Mr. CALLAHAN, Mr. SHAW, Mr. NUSSLE, Mr. LARGENT, Mr. COX, Mr. STOCKMAN, Mr. SMITH of Michigan, Mr. BAKER of California, Mr. HERGER, Mr. HEINEMAN, Mrs. FOWLER, Mr. SENSENBRENNER, Mr. STEARNS, Mr. HUTCHINSON, Mr. HANCOCK, Mr. TALENT, Mr. EMERSON, Mr. ENGLISH of Pennsylvania, Mr. ENSIGN, Mr. HOSTETTLER, Mr. JONES, Mr. TLAHRT, Mrs. MYRICK, Mr. EWING, Mr. HOUGHTON, Mrs. CUBIN, Mr. KINGSTON, Mr. HASTINGS of Washington, Mr. GANSKE, Mr. SCHAEFER, Mr. BAKER of Louisiana, Mr. HALL of Texas, Mr. WELDON of Florida, Mr. COBURN, Mr. WELLER, Mr. LEWIS of Kentucky, Mr. BUNNING of Kentucky, Mr. FOLEY, Mr. INGLIS of South Carolina, Mr. LIGHTFOOT, Mr. ISTOOK, Mr. CALVERT, Mr. HOBSON, Mr. KNOLLENBERG, Mr. BILIRAKIS, Mr. HAYWORTH, Mr. FOX, Mr. RADANOVICH, Mr. ROTH, Mr. WAMP, Mr. SOLOMON, Mr. BLILEY, Mr. DOOLITTLE, Mr. PACKARD, Mr. GILMAN, Mr. MILLER of Florida, Mr. ROYCE, Mr. FLANAGAN, Mr. LATHAM, Ms. MOLINARI, Mr. GUNDERSON, Mr. THORNBERRY, Mr. RIGGS, Mr. ALLARD, Mr. CHRISTENSEN, Mr. GOODLATTE, Mr. SANFORD, Mr. HILLEARY, Mr. COOLEY, Mr. WICKER, Mr. BONO, Mr. FRISA, Mr. MCINTOSH, Mr. EVERETT, Mr. SMITH of New Jersey, Mr. SHADEGG, Mrs. JOHNSON of Connecticut, Mr. CHRYSLER, Mr. CUNNINGHAM, Mr. CANADY, Mr. MCCOLLUM, Mr. GOODLING, Mr. BARTON of Texas, Mr. BARR, Mr. ARMEY, Mr. FORBES, Mrs. WALDHOLTZ, Mr. TATE, Ms. DUNN, Mr. MCHUGH, Mr. CRAPO, Mr. KOLBE, Mr. PAXON, Mr. YOUNG of Florida, Mr. COMBEST, Mr. COBLE, Mr. EHRLICH, and Mrs. MEYERS of Kansas) introduced the following bill; which was referred as follows:

Titles I-II, referred to the Committee on Ways and Means

Title III, referred to the Committee on Science and, in addition, to the Com-

mittees on Commerce and Government Reform and Oversight, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

Title IV, referred to the Committee on the Budget and, in addition, to the Committees on Rules, Government Reform and Oversight, and the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

Title V, referred to the Committee on Government Reform and Oversight

Title VI–IX, referred to the Committee on the Judiciary

Title X, referred to the Committee on the Budget and, in addition, to the Committees on Government Reform and Oversight, Rules, and the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

Title XI, referred to the Committee on Ways and Means and, in addition, to the Committee on the Budget, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

Title XII, referred to the Committee on Ways and Means

A BILL

To create jobs, enhance wages, strengthen property rights, maintain certain economic liberties, decentralize and reduce the power of the Federal Government with respect to the States, localities, and citizens of the United States, and to increase the accountability of Federal officials.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Job Creation and
 5 Wage Enhancement Act of 1995”.

6 **SEC. 2. TABLE OF CONTENTS.**

7 The table of contents for this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.

TITLE I—CAPITAL GAINS REFORM

- Sec. 1001. 50 percent capital gains deduction.
- Sec. 1002. Indexing of certain assets for purposes of determining gain or loss.
- Sec. 1003. Capital loss deduction allowed with respect to sale or exchange of principal residence.

TITLE II—NEUTRAL COST RECOVERY

- Sec. 2001. Depreciation adjustment for certain property placed in service after December 31, 1994.

TITLE III—RISK ASSESSMENT AND COST/BENEFIT ANALYSIS FOR NEW REGULATIONS

- Sec. 3001. Findings

Subtitle A—Risk Assessment and Communication

- Sec. 3101. Short title.
- Sec. 3102. Purposes.
- Sec. 3103. Effective date; applicability; savings provisions.
- Sec. 3104. Principles for risk assessment.
- Sec. 3105. Principles for risk characterization and communication.
- Sec. 3106. Guidelines, plan for assessing new information, and report.
- Sec. 3107. Definitions.

Subtitle B—Analysis of Risk Reduction Benefits and Costs

- Sec. 3201. Analysis of risk reduction benefits and costs.

Subtitle C—Peer Review

- Sec. 3301. Peer review program.

TITLE IV—ESTABLISHMENT OF FEDERAL REGULATORY BUDGET COST CONTROL

- Sec. 4001. Amendments to the Congressional Budget Act of 1974.
- Sec. 4002. President's annual budget submissions.
- Sec. 4003. Estimation and disclosure of costs of Federal regulation.

TITLE V—STRENGTHENING OF PAPERWORK REDUCTION ACT

- Sec. 5001. Short title.

Subtitle A—Authorization of Appropriations

- Sec. 5101. Authorization of appropriations.

Subtitle B—Reducing the Burden of Federal Paperwork on the Public

- Sec. 5201. Coverage of all federally sponsored paperwork burdens.
- Sec. 5202. Paperwork reduction goals.

Subtitle C—Enhancing Government Responsibility and Accountability for Reducing the Burden of Federal Paperwork

- Sec. 5301. Reemphasizing the responsibility of the Director to control the burden of Federal paperwork.
- Sec. 5302. Enhancing agency responsibility to obtain public review of proposed paperwork burdens.
- Sec. 5303. Expediting review at the Office of Management and Budget.
- Sec. 5304. Improving public and agency scrutiny of paperwork burdens proposed for renewal.
- Sec. 5305. Protection for whistleblowers of unauthorized paperwork burden.
- Sec. 5306. Enhancing public participation.
- Sec. 5307. Expediting review of an agency information collection request with a reduced burden.

Subtitle D—Enhancing Agency Responsibility for Sharing and Disseminating Public Information

- Sec. 5401. Prescribing governmentwide standards for sharing and disseminating public information.
- Sec. 5402. Agency responsibilities for sharing and disseminating public information.
- Sec. 5403. Agency information inventory/locator system.

Subtitle E—Additional Government Information Management Responsibility

- Sec. 5501. Strengthening the statistical policy and coordination functions of the Director.
- Sec. 5502. Use of electronic information collection and dissemination techniques to reduce burden.
- Sec. 5503. Agency implementation.
- Sec. 5504. Automatic data processing equipment plan.
- Sec. 5505. Technical and conforming amendments.

Subtitle F—Effective Dates

- Sec. 5601. Effective dates.

TITLE VI—STRENGTHENING REGULATORY FLEXIBILITY

- Sec. 6001. Judicial review.
- Sec. 6002. Consideration of direct and indirect effects of rules.
- Sec. 6003. Rules opposed by SBA Chief Counsel for Advocacy.
- Sec. 6004. Sense of Congress regarding SBA Chief Counsel for Advocacy.

TITLE VII—REGULATORY IMPACT ANALYSES

- Sec. 7001. Short title.
- Sec. 7002. Rule making notices for major rules.
- Sec. 7003. Hearing requirement for proposed rules; extension of comment period.
- Sec. 7004. Regulatory impact analysis.
- Sec. 7005. Additional responsibilities of Director of the Office of Management and Budget.
- Sec. 7006. Standard of clarity.
- Sec. 7007. Report by OIRA.
- Sec. 7008. Definitions.

TITLE VIII—PROTECTION AGAINST FEDERAL REGULATORY ABUSE

Subtitle A—Citizens' Regulatory Bill of Rights

Sec. 8101. Citizens' regulatory bill of rights.

Subtitle B—Private Sector Whistleblowers' Protection

Sec. 8201. Short title.

Sec. 8202. Purpose.

Sec. 8203. Coverage.

Sec. 8204. Prohibited regulatory practices.

Sec. 8205. Prohibited regulatory practice as a defense to agency action.

Sec. 8206. Enforcement.

Sec. 8207. Citizen suits.

Sec. 8208. Office of the Special Counsel.

Sec. 8209. Relation to criminal investigations.

TITLE IX—PRIVATE PROPERTY RIGHTS PROTECTIONS AND
COMPENSATION

Sec. 9001. Statement of purpose.

Sec. 9002. Compensation for Federal agency infringement or deprivation of rights to private property.

Sec. 9003. Severability.

Sec. 9004. Definitions.

TITLE X—ESTABLISHMENT OF FEDERAL MANDATE BUDGET
COST CONTROL

Sec. 10001. Amendments to the Congressional Budget Act of 1974.

Sec. 10002. President's annual budget submissions.

Sec. 10003. Estimation and disclosure of costs of Federal mandates.

TITLE XI—TAXPAYER DEBT BUY-DOWN

Sec. 11001. Designation of amounts for reduction of public debt.

Sec. 11002. Public Debt Reduction Trust Fund.

Sec. 11003. Taxpayer-generated sequestration of Federal spending to reduce the public debt.

TITLE XII—SMALL BUSINESS INCENTIVES

Sec. 12001. Increase in unified estate and gift tax credits.

Sec. 12002. Increase in expense treatment for small businesses.

Sec. 12003. Clarification of definition of principal place of business.

Sec. 12004. Treatment of storage of product samples.

TITLE I—CAPITAL GAINS

REFORM

SEC. 1001. 50 PERCENT CAPITAL GAINS DEDUCTION.

(a) GENERAL RULE.—Part I of subchapter P of

chapter 1 of the Internal Revenue Code of 1986 (relating

1 this paragraph for any taxable year in the recovery pe-
2 riod.”

3 (d) EFFECTIVE DATE.—The amendments made by
4 this section shall apply to taxable years ending after De-
5 cember 31, 1994.

6 **TITLE III—RISK ASSESSMENT**
7 **AND COST/BENEFIT ANALYSIS**
8 **FOR NEW REGULATIONS**

9 **SEC. 3001. FINDINGS.**

10 The Congress finds that:

11 (1) Environmental, health, and safety regula-
12 tions have led to dramatic improvements in the envi-
13 ronment and have significantly reduced human
14 health risk; however, the Federal regulations that
15 have led to these improvements have been more cost-
16 ly and less effective than they could have been; too
17 often, regulatory priorities have not been based upon
18 a realistic consideration of risk, risk reduction op-
19 portunities, and costs.

20 (2) The public and private resources available
21 to address health, safety, and environmental con-
22 cerns are not unlimited; those resources need to be
23 allocated to address the greatest needs in the most
24 cost-effective manner and so that the incremental

1 costs of regulatory options are reasonably related to
2 the incremental benefits.

3 (3) To provide more cost-effective and cost-
4 reasonable protection to human health and the envi-
5 ronment, regulatory priorities should be based upon
6 realistic consideration of risk; the priority setting
7 process must include scientifically sound, objective,
8 and unbiased risk assessments, comparative risk
9 analysis, and risk management choices that are
10 grounded in cost-benefit principles.

11 (4) Risk assessment has proven to be a useful
12 decision making tool; however, improvements are
13 needed in both the quality of assessments and the
14 characterization and communication of findings; sci-
15 entific and other data must be better collected, orga-
16 nized, and evaluated; most importantly, the critical
17 information resulting from a risk assessment must
18 be effectively communicated in an objective and un-
19 biased manner to decision makers, and from decision
20 makers to the public.

21 (5) The public stake holders must be fully in-
22 volved in the risk-decision making process. They
23 have the right-to-know about the risks addressed by
24 regulation, the amount of risk to be reduced, the
25 quality of the science used to support decisions, and

1 the cost of implementing and complying with regula-
2 tions. This knowledge will allow for public scrutiny
3 and promote quality, integrity, and responsiveness of
4 agency decisions.

5 **Subtitle A—Risk Assessment and** 6 **Communication**

7 **SEC. 3101. SHORT TITLE.**

8 This subtitle may be cited as the “Risk Assessment
9 and Communication Act of 1995”.

10 **SEC. 3102. PURPOSES.**

11 The purposes of this subtitle are—

12 (1) to present the public and executive branch
13 with the most scientifically objective and unbiased
14 information concerning the nature and magnitude of
15 health, safety, and environmental risks in order to
16 provide for sound regulatory decisions and public
17 education;

18 (2) to provide for full consideration and discus-
19 sion of relevant data and potential methodologies;

20 (3) to require explanation of significant choices
21 in the risk assessment process which will allow for
22 better peer review and public understanding; and

23 (4) to improve consistency within the executive
24 branch in preparing risk assessments and risk char-
25 acterizations.

1 **SEC. 3103. EFFECTIVE DATE; APPLICABILITY; SAVINGS**
2 **PROVISIONS.**

3 (a) **EFFECTIVE DATE.**—Except as otherwise specifi-
4 cally provided in this subtitle, the provisions of this sub-
5 title shall take effect 18 months after the date of enact-
6 ment of this subtitle.

7 (b) **APPLICABILITY.**—

8 (1) **IN GENERAL.**—Except as provided in para-
9 graph (2), this title applies to all risk assessments
10 and risk characterizations prepared by, or on behalf
11 of, any Federal agency in connection with Federal
12 regulatory programs designed to protect human
13 health, safety, or the environment.

14 (2) **EXCEPTIONS.**—(A) This title does not apply
15 to risk assessments or risk characterizations per-
16 formed with respect to either of the following:

17 (i) A situation that the head of the agency
18 considers to be an emergency.

19 (ii) A screening analysis, including a
20 screening analysis for purposes of product regu-
21 lation, product reregistration, or
22 premanufacturing notices.

23 (B) No analysis shall be treated as a screening
24 analysis for purposes of subparagraph (A) if the re-
25 sults of such analyses are used either—

1 (i) as the basis for imposing restrictions on
2 substances or activities, or

3 (ii) to characterize a positive finding of
4 risks from substances or activities in any final
5 agency document made available to the general
6 public.

7 (3) LABELS.—This title shall not apply to any
8 food, drug, or other product label or to any risk
9 characterization appearing on any such label.

10 (c) SAVINGS PROVISIONS.—Nothing in this subtitle
11 shall be construed to modify any statutory standard or re-
12 quirement designed to protect health, safety, or the envi-
13 ronment. Nothing in this subtitle shall be interpreted to
14 preclude the consideration of any data or the calculation
15 of any estimate to more fully describe risk or provide ex-
16 amples of scientific uncertainty or variability. Nothing in
17 this title shall be construed to require the disclosure of
18 any trade secret or other confidential information.

19 **SEC. 3104. PRINCIPLES FOR RISK ASSESSMENT.**

20 (a) IN GENERAL.—The head of each Federal agency
21 shall apply the principles set forth in subsection (b) when
22 preparing risk assessments in order to assure that such
23 risk assessments and all of their components distinguish
24 scientific findings from other considerations and are, to
25 the maximum extent feasible, scientifically objective, unbi-

1 ased, and inclusive of all relevant data. Discussions or ex-
2 planations required under this section need not be re-
3 peated in each risk assessment document as long as there
4 is a reference to the relevant discussion or explanation in
5 another agency document.

6 (b) PRINCIPLES.—The principles to be applied when
7 preparing risk assessments are as follows:

8 (1) When assessing human health risks, a risk
9 assessment shall consider and discuss both labora-
10 tory and epidemiological data of sufficient quality
11 which finds, or fails to find, a correlation between
12 health risks and a potential toxin or activity. Where
13 conflicts among such data appear to exist, or where
14 animal data is used as a basis to assess human
15 health, the assessment shall include discussion of
16 possible reconciliation of conflicting information, and
17 as appropriate, differences in study designs, com-
18 parative physiology, routes of exposure,
19 bioavailability, pharmacokinetics, and any other rel-
20 evant factor.

21 (2) Where a risk assessment involves selection
22 of any significant assumption, inference, or model,
23 the Federal agency preparing the assessment shall—

1 (A) present a representative list and expla-
2 nation of plausible and alternative assumptions,
3 inferences, or models;

4 (B) explain the basis for any choices;

5 (C) identify any policy or value judgments;

6 (D) fully describe any model used in the
7 risk assessment and make explicit the assump-
8 tions incorporated in the model; and

9 (E) indicate the extent to which any sig-
10 nificant model has been validated by, or con-
11 flicts with, empirical data.

12 **SEC. 3105. PRINCIPLES FOR RISK CHARACTERIZATION AND**
13 **COMMUNICATION.**

14 In characterizing risk in any risk assessment docu-
15 ment, regulatory proposal or decision, report to Congress,
16 or other document which is made available to the public,
17 each Federal agency characterizing the risk shall comply
18 with each of the following:

19 (1) **ESTIMATES OF RISK.**—The head of such
20 agency shall describe the populations or natural re-
21 sources which are the subject of the risk character-
22 ization. If a numerical estimate of risk is provided,
23 the agency shall, to the extent feasible and scientif-
24 ically appropriate, provide—

1 (A) the best estimate or estimates for the
2 specific populations or natural resources which
3 are the subject of the characterization (based
4 on the information available to the department,
5 agency, or instrumentality); and

6 (B) a statement of the reasonable range of
7 scientific uncertainties.

8 In addition to such best estimate or estimates, the
9 Federal agency may present plausible upper-bound
10 or conservative estimates in conjunction with plau-
11 sible lower bounds estimates. Where appropriate, the
12 Federal agency may present, in lieu of a single best
13 estimate, multiple estimates based on assumptions,
14 inferences, or models which are equally plausible,
15 given current scientific understanding. To the extent
16 practical and appropriate, the Federal agency shall
17 provide descriptions of the distribution and prob-
18 ability of risk estimates to reflect differences in ex-
19 posure variability in populations and uncertainties.

20 (2) EXPOSURE SCENARIOS.—The Federal agen-
21 cy shall explain the exposure scenarios used in any
22 risk assessment, and, to the extent feasible, provide
23 a statement of the size of the corresponding popu-
24 lation at risk and the likelihood of such exposure
25 scenarios.

1 (3) COMPARISONS.—To the extent feasible, the
2 Federal agency shall provide a statement that places
3 the nature and magnitude of risks to human health
4 in context. Such statement shall include appropriate
5 comparisons with estimates of risks that are familiar
6 to and routinely encountered by the general public
7 as well as other risks. The statement shall identify
8 relevant distinctions among categories of risk and
9 limitations to comparisons.

10 (4) SUBSTITUTION RISKS.—When a Federal
11 agency provides a risk assessment or risk character-
12 ization for a proposed or final regulatory action,
13 such assessment or characterization shall include a
14 statement of any significant substitution risks to
15 human health, where information on such risks has
16 been provided to the agency.

17 (5) SUMMARIES OF OTHER RISK ESTIMATES.—
18 If—

19 (A) a Federal agency provides a public
20 comment period with respect to a risk assess-
21 ment or regulation,

22 (B) a commenter provides a risk assess-
23 ment, and a summary of results of such risk as-
24 sessment, and

1 (C) such risk assessment is consistent with
2 the principles and the guidance provided under
3 this subtitle,

4 the agency shall present such summary in connec-
5 tion with the presentation of the agency's risk as-
6 sessment or the regulation.

7 **SEC. 3106. GUIDELINES, PLAN FOR ASSESSING NEW INFOR-**
8 **MATION, AND REPORT.**

9 (a) **GUIDELINES.**—Within 15 months after the date
10 of enactment of this subtitle, the President shall issue
11 guidelines for Federal agencies consistent with the risk as-
12 sessment and characterization principles set forth in sec-
13 tions 3104 and 3105 and shall provide a format for sum-
14 marizing risk assessment results. In addition, such guide-
15 lines shall include guidance on at least the following sub-
16 jects: criteria for scaling animal studies to assess risks to
17 human health; use of different types of dose-response
18 models; thresholds; definitions, use, and interpretations of
19 the maximum tolerated dose; weighting of evidence with
20 respect to extrapolating human health risks from sensitive
21 species; evaluation of benign tumors, and evaluation of dif-
22 ferent human health endpoints.

23 (b) **PLAN.**—Within 18 months after the date of en-
24 actment of this subtitle, each Federal agency shall publish
25 a plan to review and revise any risk assessment published

1 prior to the expiration of such 18-month period if the
2 agency determines that significant new information or
3 methodologies are available that could significantly alter
4 the results of the prior risk assessment. The plan shall
5 provide procedures for receiving and considering new in-
6 formation and risk assessments from the public. The plan
7 may set priorities for review and revision of risk assess-
8 ments based on factors such Federal agency considers ap-
9 propriate.

10 (c) REPORT.—Within 3 years after the enactment of
11 this subtitle, each Federal agency shall provide a report
12 to the Congress evaluating the categories of policy and
13 value judgments identified under subparagraph (C) of sec-
14 tion 3104(b)(2).

15 (d) PUBLIC COMMENT AND CONSULTATION.—The
16 guidelines, plan and report under this section, shall be de-
17 veloped after notice and opportunity for public comment,
18 and after consultation with representatives of appropriate
19 State agencies and local governments, and such other de-
20 partments and agencies, offices, organizations, or persons
21 as may be advisable.

22 (e) REVIEW.—The President shall review the guide-
23 lines published under this section at least every 4 years.

24 **SEC. 3107. DEFINITIONS.**

25 For purposes of this subtitle:

1 (1) RISK ASSESSMENT.—The term “risk assess-
2 ment” means the process of identifying hazards and
3 quantifying or describing the degree of toxicity, ex-
4 posure, or other risk they pose for exposed individ-
5 uals, populations, or resources. Such term also refers
6 to the document containing the explanation of how
7 the assessment process has been applied to an indi-
8 vidual substance, activity, or condition.

9 (2) RISK CHARACTERIZATION.—The term “risk
10 characterization” means that element of a risk as-
11 sessment that involves presentation of the degree of
12 risk in any regulatory proposal or decision, report to
13 Congress, or other document which is made available
14 to the public. The term includes discussions of un-
15 certainties, conflicting data, estimates, extrapo-
16 lations, inferences, and opinions.

17 (3) BEST ESTIMATE.—The term “best esti-
18 mate” means an estimate which, to the extent fea-
19 sible and scientifically appropriate, is based on one
20 of the following:

21 (A) Central estimates of risk using the
22 most plausible assumptions.

23 (B) An approach which combines multiple
24 estimates based on different scenarios and
25 weighs the probability of each scenario.

1 (C) Any other methodology designed to
2 provide the most unbiased representation of the
3 most plausible level of risk, given the current
4 scientific information available to the Federal
5 agency concerned.

6 (4) SUBSTITUTION RISK.—The term “substi-
7 tution risk” means a potential increased risk to
8 human health, safety, or the environment from a
9 regulatory option designed to decrease other risks.

10 (5) FEDERAL AGENCY.—The term “Federal
11 agency” means an executive department, military de-
12 partment, or independent establishment as defined
13 in part I of title 5 of the United States Code, except
14 that such term also includes the Office of Tech-
15 nology Assessment.

16 **Subtitle B—Analysis of Risk**
17 **Reduction Benefits and Costs**

18 **SEC. 3201. ANALYSIS OF RISK REDUCTION BENEFITS AND**
19 **COSTS.**

20 (a) IN GENERAL.—Except as provided in subsection
21 (b), the President shall require each executive branch
22 agency to prepare the following for each major rule de-
23 signed to protect human health, safety, or the environment
24 that is proposed or promulgated by the agency after the
25 date of enactment of this Act:

1 (1) For each such proposed or promulgated
2 rule, an assessment of incremental costs and incre-
3 mental risk reduction or other benefits associated
4 with each significant regulatory alternative consid-
5 ered by the agency in connection with the rule or
6 proposed rule.

7 (2) For each such proposed or promulgated
8 rule, to the extent feasible, a comparison of any
9 human health, safety, or environmental risks ad-
10 dressed by the regulatory alternatives to other risks
11 chosen by the head of the agency, including at least
12 3 other risks regulated by the agency and to at least
13 3 other risks with which the public is familiar.

14 (3) For each such proposed or promulgated
15 rule, a statement of other human health risks poten-
16 tially posed by implementing or complying with the
17 regulatory alternatives, including substitution risks.

18 (4) For each final rule, an assessment of the
19 costs and risk reduction or other benefits associated
20 with implementation of, and compliance with, the
21 rule.

22 (5) For each final rule, a certification by the
23 head of the agency of each of the following:

24 (A) A certification that the assessment
25 under paragraph (4) is based on an objective

1 and unbiased scientific and economic evaluation
2 of all significant and relevant information pro-
3 vided to the agency by interested parties relat-
4 ing to the costs, risks, and risk reduction or
5 other benefits addressed by the rule. Such in-
6 formation shall have been subjected to peer re-
7 view to the extent required by section 3301.

8 (B) A certification that the rule will sub-
9 stantially advance the purpose of protecting
10 human health or the environment, as applicable,
11 against the risk addressed by the rule.

12 (C) A certification that the rule will
13 produce benefits to human health or the envi-
14 ronment that will justify the costs incurred by
15 local and State governments, the Federal Gov-
16 ernment, and other public and private entities
17 as a result of implementation of and compliance
18 with the rule, as determined under paragraph
19 (1).

20 (D) A certification that there is no regu-
21 latory alternative that is allowed by the statute
22 under which the regulation is promulgated that
23 would achieve an equivalent reduction in risk in
24 a more cost-effective manner, along with a brief
25 explanation of why other regulatory alternatives

1 that were considered by the head of the agency
2 were found to be less cost-effective.

3 (b) PUBLICATION.—For each major rule referred to
4 in subsection (a) the head of each agency shall publish
5 in a clear and concise manner in the Federal Register
6 along with the proposed or final regulation, or otherwise
7 make publicly available, the information required to be
8 prepared under subsection (a) of this section.

9 (c) DEFINITIONS.—For purposes of this section:

10 (1) COSTS.—The term “costs” includes the di-
11 rect and indirect costs to the United States govern-
12 ment, costs to State and local governments, and
13 costs to the private sector, of implementing and
14 complying with a regulatory action.

15 (2) MAJOR RULE.— The term “major rule”
16 means any regulation that is likely to result in one
17 or more of the following:

18 (A) An annual effect on the economy of
19 \$25,000,000 or more.

20 (B) A major increase in costs or prices for
21 consumers, individual industries, Federal,
22 State, or local government agencies, or geo-
23 graphic regions.

24 (C) Significant adverse effects on competi-
25 tion, employment, investment, productivity, in-

1 novation, or on the ability of United States-
2 based enterprises to compete with foreign-based
3 enterprises in domestic or export markets.

4 **Subtitle C—Peer Review**

5 **SEC. 3301. PEER REVIEW PROGRAM.**

6 (a) **ESTABLISHMENT.**—For regulatory programs ad-
7 dressing human health, safety, or the environment, the
8 head of each Federal agency shall develop a systematic
9 program for peer review of risk assessments and economic
10 assessments used by the agency. Such program shall be
11 applicable across the agency and—

12 (1) shall provide for the creation of peer review
13 panels consisting of independent and external ex-
14 perts who are broadly representative and balanced to
15 the extent feasible;

16 (2) may provide for differing levels of peer re-
17 view depending on the significance or the complexity
18 of the problems or the need for expeditiousness;

19 (3) shall not exclude peer reviewers merely be-
20 cause they represent entities that may have a poten-
21 tial interest in the outcome, provided that interest is
22 fully disclosed to the agency; and

23 (4) shall provide open opportunity to become
24 part of a peer review panel at a minimum by solicit-

1 ing nominations through a Federal Register an-
2 nouncement.

3 (b) REQUIREMENT FOR PEER REVIEW.—Each Fed-
4 eral agency shall provide for peer review of scientific and
5 economic information used for purposes of any evaluation
6 under section 3201(a)(5)(A) or for purposes of any signifi-
7 cant risk or cost assessment prepared in connection with
8 a major rule. In addition, the Director of the Office of
9 Management and Budget shall order that peer review be
10 provided for any major risk assessment or cost assessment
11 that may have a significant impact on public policy deci-
12 sions.

13 (c) CONTENTS.—

14 (1) IN GENERAL.—Each peer review under this
15 section shall include a report to the Federal agency
16 concerned with respect to each of the following:

17 (A) An evaluation of the technical, sci-
18 entific, and economic merit of the data and
19 methods used for the assessment and analysis.

20 (B) A list of any considerations that were
21 not taken into account in the assessment and
22 analysis, but were considered appropriated by a
23 majority of the members' of the peer review
24 panel.

1 (C) A discussion of the methodology used
2 for the assessment and analysis.

3 (2) COMMENTS AND APPENDIX.—Each peer re-
4 view report under this subsection shall include—

5 (A) all comments supported by a majority
6 of the members of the peer review panel sub-
7 mitting the report; and

8 (B) an appendix which sets forth the dis-
9 senting opinions that any peer review panel
10 member wants to express.

11 (3) SEPARATION OF ASSESSMENTS.—Peer re-
12 view of human health, safety, environmental, and
13 economic assessments may be separated for purpose
14 of this subtitle.

15 (d) RESPONSE TO PEER REVIEW.—The head of the
16 Federal agency shall provide a written response to all sig-
17 nificant peer review comments.

18 (e) AVAILABILITY TO PUBLIC.—All peer review com-
19 ments or conclusions and the agency's responses shall be
20 made available to the public and shall be made part of
21 the administrative record for purposes of judicial review
22 of any final agency action.

23 (f) PREVIOUSLY REVIEWED DATA AND ANALYSIS.—
24 No peer review shall be required under this section for
25 any data or analysis which has been previously subjected

1 to peer review or for any component of any evaluation or
2 assessment previously subjected to peer review.

3 (g) NATIONAL PANELS.—The President shall appoint
4 National Peer Review Panels to annually review the risk
5 assessment and cost assessment practices of each Federal
6 agency for programs designed to protect human health,
7 safety, or the environment. The Panel shall submit a re-
8 port to the Congress no less frequently than annually con-
9 taining the results of such review.

10 (h) MAJOR RULE DEFINED.—For purposes of this
11 section, the term “major rule” has the same meaning as
12 provided by section 3201(c) except that “\$100,000,000”
13 shall be substituted for “\$25,000,000”.

14 **TITLE IV—ESTABLISHMENT OF**
15 **FEDERAL REGULATORY**
16 **BUDGET COST CONTROL**

17 **SEC. 4001. AMENDMENTS TO THE CONGRESSIONAL BUDGET**
18 **ACT OF 1974.**

19 (a) FEDERAL REGULATORY BUDGET COST CONTROL
20 SYSTEM.—Title III of the Congressional Budget Act of
21 1974 is amended by inserting before section 300 the fol-
22 lowing new center heading “**PART A—GENERAL**
23 **PROVISIONS**” and by adding at the end the following
24 new part:

1 **"PART B—FEDERAL REGULATORY BUDGET COST**
2 **CONTROL**

3 **"SEC. 321. OMB-CBO REPORTS.**

4 “(a) OMB-CBO INITIAL REPORT.—Within 1 year
5 after the date of enactment of this section, OMB and CBO
6 shall jointly issue a report to the President and each
7 House of Congress that contains the following:

8 “(1) For the first budget year beginning after
9 the issuance of this report, a projection of the aggre-
10 gate direct cost to the private sector of complying
11 with all Federal regulations and rules in effect im-
12 mediately before issuance of the report containing
13 the projection for that budget year of the effect of
14 current-year Federal regulations and rules into the
15 budget year and the outyears based on those regula-
16 tions and rules.

17 “(2) A calculation of the estimated aggregate
18 direct cost to the private sector of compliance with
19 all Federal regulations and rules as a percentage of
20 the gross domestic product (GDP).

21 “(3) The estimated marginal cost (measured as
22 a reduction in estimated gross domestic product) to
23 the private sector of compliance with all Federal reg-
24 ulations and rules in excess of 5 percent of the gross
25 domestic product.

1 “(4) The effect on the domestic economy of dif-
2 ferent types of Federal regulations and rules.

3 “(5) The appropriate level of personnel, admin-
4 istrative overhead, and programmatic savings that
5 should be achieved on a fiscal year by fiscal year
6 basis by Federal agencies that issue regulations or
7 rules with direct costs to the private sector through
8 the reduction of such aggregate costs to the private
9 sector by equal percentage increments in the 6 years
10 following the budget year until the aggregate level of
11 such costs does not exceed 5 percent of the esti-
12 mated gross domestic product for the same fiscal
13 year as the estimated costs that will be incurred.

14 “(6) Recommendations for budgeting, technical,
15 and estimating changes to improve the Federal regu-
16 latory budgeting process.

17 “(b) UPDATE REPORTS.—OMB and CBO shall issue
18 update reports on September 15th of the fifth year begin-
19 ning after issuance of the initial report and at 5-year in-
20 tervals thereafter containing all the information required
21 in the initial report, but based upon all Federal regula-
22 tions and rules in effect immediately before issuance of
23 the most recent update report.

24 “(c) INITIAL BASELINE REPORT.—Within 30 days
25 after the date of enactment of this section, OMB and CBO

1 shall jointly issue a report to the President and each
2 House of Congress that contains an initial aggregate regu-
3 latory baseline for the first budget year that begins at
4 least 120 days after that date of enactment. That baseline
5 will be a projection of the aggregate direct cost to the pri-
6 vate sector of complying with all Federal regulations and
7 rules in effect immediately before issuance of the report
8 containing the projection for that budget year of the effect
9 of current-year Federal regulations and rules into the
10 budget year and the outyears based on those regulations
11 and rules.

12 **"SEC. 322. AGGREGATE REGULATORY BASELINE.**

13 “(a) IN GENERAL.—For the first budget year begin-
14 ning after the date of enactment of this section and for
15 every other fiscal year thereafter, the aggregate regulatory
16 baseline refers to a projection of the aggregate direct cost
17 to the private sector of complying with all Federal regula-
18 tions and rules in effect immediately before issuance of
19 the report containing the projection for that budget year
20 of the effect of current-year Federal regulations and rules
21 into the budget year and the outyears based on those regu-
22 lations and rules. However, in the case of each of the suc-
23 ceeding fiscal years, the baseline shall be adjusted for the
24 estimated growth during that year in the gross domestic
25 product (GDP)

1 “(b) OMB-CBO AGGREGATE REGULATORY BASE-
2 LINE REPORTS.—(1) The first budget year for which there
3 shall be an aggregate regulatory baseline shall be the
4 budget year to which the initial OMB-CBO baseline report
5 issued under section 321(c) pertains.

6 “(2) In the case of each budget year after the budget
7 year referred to in paragraph (1), not later than Septem-
8 ber 15 of the current year, OMB and CBO shall jointly
9 issue a report containing the baseline referred to in sub-
10 section (a) for that budget year.

11 **“SEC. 323. RECONCILIATION AND ALLOCATIONS.**

12 “(a) RECONCILIATION DIRECTIVES.—In addition to
13 the requirements of section 310, a concurrent resolution
14 on the budget for any fiscal year shall specify—

15 “(1) changes in laws and regulations and rules
16 necessary to reduce the aggregate direct cost to the
17 private sector of complying with all Federal regula-
18 tions by 6.5 percent for the budget year (as meas-
19 ured against the aggregate regulatory baseline for
20 the first budget year to which this part applies) and
21 by equal percentage increments for each of the out-
22 years (until the aggregate level of such costs does
23 not exceed 5 percent of the estimated gross domestic
24 product for the same fiscal year as the estimated
25 costs that will be incurred) for Federal agencies that

1 issue regulations or rules producing direct costs to
2 the private sector; and

3 “(2) changes in laws necessary to achieve re-
4 ductions in the level of personnel and administrative
5 overhead and to achieve programmatic savings for
6 the budget year and the outyears for those agencies
7 of the following:

8 “(A) In the first outyear, one-fourth of the
9 percent of reduction in regulatory authority
10 from the aggregate regulatory base.

11 “(B) In the second outyear, one-third of
12 the percent of reduction in regulatory authority
13 from the aggregate regulatory base.

14 “(C) In the third, fourth, fifth, and sixth
15 years following the budget year, one-half of the
16 percent of reduction in regulatory authority
17 from the aggregate regulatory base.

18 Section 310(c) shall not apply with respect to directions
19 made under this section.

20 “(b) ALLOCATION OF TOTALS.—(1) The Committees
21 on the Budget of the House of Representatives and the
22 Senate shall each allocate aggregate 2-year regulatory au-
23 thority among each committee of its House and by major
24 functional category for the first budget year beginning
25 after the date of enactment of this section and for the

1 second, fourth, and sixth years following the budget year
2 and then every other year thereafter.

3 “(2) As soon as practicable after receiving an alloca-
4 tion under paragraph (1), each committee shall subdivide
5 its allocation among its subcommittees or among pro-
6 grams over which it has jurisdiction.

7 “(c) POINT OF ORDER.—(1) It shall not be in order
8 in the House of Representatives or the Senate to consider
9 any bill or resolution, or amendment thereto, which would
10 cause the appropriate allocation made under subsection
11 (b) for a fiscal year of regulatory authority to be exceeded.

12 “(2) WAIVER.—The point of order set forth in para-
13 graph (1) may only be waived by the affirmative vote of
14 at least three-fifths of the Members voting, a quorum
15 being present.

16 “(d) DETERMINATIONS BY BUDGET COMMITTEES.—
17 For purposes of this section, the level of regulatory au-
18 thority for a fiscal year shall be determined by the Com-
19 mittee on the Budget of the House of Representatives or
20 the Senate, as the case may be.

21 “(e) EXCEEDING ALLOCATION TOTALS.—Whenever
22 any Committee of the House of Representatives exceeds
23 its allocation of aggregate 2-year regulatory authority
24 under subsection (b)(1), any Member of the House of Rep-
25 resentatives may offer a bill in the House (which shall be

1 highly privileged, unamendable, and debateable for 30
2 minutes) which shall only prohibit the issuance of regula-
3 tions and rules by any agency under the jurisdiction of
4 that committee for the fiscal years covered by that alloca-
5 tion until that committee eliminates its breach.

6 **"SEC. 324. ANALYSIS OF REGULATORY COSTS BY CONGRES-**
7 **SIONAL BUDGET OFFICE.**

8 "CBO shall prepare for each bill or resolution of a
9 public character reported by any committee of the House
10 of Representatives or the Senate (except the Committee
11 on Appropriations of each House), and submit to such
12 committee—

13 "(1) an estimate of the costs which would be in-
14 curred by the private sector in carrying out or com-
15 plying with such bill or resolution in the fiscal year
16 in which it is to become effective and in each of the
17 4 fiscal years following such fiscal year, together
18 with the basis of each such estimate; and

19 "(2) a comparison of the estimate of costs de-
20 scribed in paragraph (1) with any available esti-
21 mates of costs made by such committee or by any
22 Federal agency.

23 **"SEC. 325. DEFINITIONS.**

24 "As used in this part:

1 “(1) The term ‘CBO’ refers to the Director of
2 the Congressional Budget Office.

3 “(2) The term ‘OMB’ refers to the Director of
4 the Office of Management and Budget.

5 “(3) The term ‘regulatory authority’ or ‘regu-
6 latory cost’ means the direct cost to the private sec-
7 tor of complying with Federal regulations and rules.

8 “(4) The term ‘direct costs’ means (recognizing
9 that direct costs are not the only costs associated
10 with Federal regulation) all expenditures occurring
11 as a direct result of complying with Federal regula-
12 tion, rule, statement, or legislation, except those ap-
13 plying to the military or agency organization, man-
14 agement, and personnel.

15 “(5) The term ‘regulation’ or the term ‘rule’
16 means any agency statement of general applicability
17 and future effect designed to implement, interpret,
18 or prescribe law or policy or describing the proce-
19 dure or practice requirements of any agency, but
20 does not include—

21 “(A) administrative actions governed by
22 the provisions of sections 556 and 557 of title
23 5, United States Code; or

1 “(B) rules or regulations issued with re-
2 spect to a military or foreign affairs function of
3 the United States.

4 “(6) The term ‘agency’ means any authority of
5 the United States that is an agency under title sec-
6 tion 3502(1) of title 44, United States Code, includ-
7 ing independent agencies.”.

8 **SEC. 4002. PRESIDENT'S ANNUAL BUDGET SUBMISSIONS.**

9 Section 1105(a) of title 31, United States Code, is
10 amended by adding at the end the following new para-
11 graph:

12 “(32) a regulatory authority budget analysis of
13 the aggregate direct cost to the private sector of
14 complying with all current and proposed Federal
15 regulations and rules and proposals for complying
16 with section 323 of the Congressional Budget Act of
17 1974 for the budget year and the outyears.”

18 **SEC. 4003. ESTIMATION AND DISCLOSURE OF COSTS OF**
19 **FEDERAL REGULATION.**

20 Chapter 6 of title 5, United States Code, popularly
21 known as the “Regulatory Flexibility Act”, is amended—

22 (1) in section 603(a) in the second sentence by
23 inserting before the period the following: “and the
24 monetary costs to small entities, other businesses,

1 and individuals of complying with the proposed
2 rule”;

3 (2) by adding at the end of section 603 the
4 following:

5 “(d) Each initial regulatory flexibility analysis shall
6 also contain a description of the nature and amount of
7 monetary costs that will be incurred by small entities,
8 other businesses, and individuals in complying with the
9 proposed rule.”;

10 (3) in section 604(a)—

11 (A) in paragraph (2) by striking “and”
12 after the semicolon;

13 (B) in paragraph (3) by striking the period
14 and inserting “; and”; and

15 (C) by adding at the end the following:

16 “(4) a statement of the nature and amount of
17 monetary costs that will be incurred by small enti-
18 ties, other businesses, and individuals in complying
19 with the rule.”; and

20 (4) in section 607 by inserting before the period
21 the following: “, except that estimates of monetary
22 costs under sections 603(d) and 604(a)(4) shall only
23 be in the form of a numerical description”.

1 **Subtitle F—Effective Dates**

2 **SEC. 5601. EFFECTIVE DATES.**

3 (a) **IN GENERAL.**—Except as provided in subsection
4 (b), the provisions of this title shall become effective 120
5 days after the date of the enactment of this Act.

6 (b) **IN PARTICULAR.**—section 5101 and this section
7 shall become effective upon the date of the enactment of
8 this Act.

9 **TITLE VI—STRENGTHENING**
10 **REGULATORY FLEXIBILITY**

11 **SEC. 6001. JUDICIAL REVIEW.**

12 (a) **IN GENERAL.**—Section 611 of title 5, United
13 States Code, is repealed.

14 (b) **CONFORMING AMENDMENT.**—The table of sec-
15 tions at the beginning of chapter 6 of title 5, United
16 States Code, is amended by striking the item relating to
17 section 611.

18 **SEC. 6002. CONSIDERATION OF DIRECT AND INDIRECT EF-**

19 **FECTS OF RULES.**

20 (a) **IN GENERAL.**—Title 5, United States Code, is
21 amended by inserting after section 610 the following new
22 section:

1 **“§ 611. Consideration of direct and indirect effects of**
2 **rules**

3 “In determining under this chapter whether or not
4 a rule is likely to have a significant impact on a substan-
5 tial number of small entities, an agency shall consider both
6 the direct and indirect effects of the rule.”.

7 (b) CONFORMING AMENDMENT.—The table of sec-
8 tions at the beginning of chapter 6 of title 5, United
9 States Code, is amended by inserting after the item relat-
10 ing to section 610 the following:

“611. Consideration of direct and indirect effects of rules.”.

11 **SEC. 6003. RULES OPPOSED BY SBA CHIEF COUNSEL FOR**
12 **ADVOCACY.**

13 (a) IN GENERAL.—Section 612 of title 5, United
14 States Code, is amended by adding at the end the follow-
15 ing new subsection:

16 “(d) STATEMENT OF OPPOSITION.—

17 “(1) TRANSMITTAL OF PROPOSED RULES AND
18 INITIAL REGULATORY FLEXIBILITY ANALYSIS TO
19 SBA CHIEF COUNSEL FOR ADVOCACY.—On or before
20 the 30th day preceding the date of publication by an
21 agency of general notice of proposed rulemaking for
22 a rule, the agency shall transmit to the Chief Coun-
23 sel for Advocacy of the Small Business Administra-
24 tion—

25 “(A) a copy of the proposed rule; and

1 “(B)(i) a copy of the initial regulatory
2 flexibility analysis for the rule if required under
3 section 603; or

4 “(ii) a determination by the agency that an
5 initial regulatory flexibility analysis is not re-
6 quired for the proposed rule under section 603
7 and an explanation for the determination.

8 “(2) STATEMENT OF OPPOSITION.—On or be-
9 fore the 15th day following receipt of a proposed
10 rule and initial regulatory flexibility analysis from an
11 agency under paragraph (1), the Chief Counsel for
12 Advocacy may transmit to the agency a written
13 statement of opposition of the proposed rule.

14 “(3) RESPONSE.—If the Chief Counsel for Ad-
15 vocacy transmits to an agency a statement of opposi-
16 tion to a proposed rule in accordance with para-
17 graph (2), the agency shall publish the statement,
18 together with the response of the agency to the
19 statement, in the Federal Register at the time of
20 publication of general notice of proposed rulemaking
21 for the rule.”.

22 “(b) CONFORMING AMENDMENT.—Section 603(a) of
23 title 5, United States Code, is amended by inserting “in
24 accordance with section 612(d)” before the period at the
25 end of the last sentence.

1 **SEC. 6004. SENSE OF CONGRESS REGARDING SBA CHIEF**
2 **COUNSEL FOR ADVOCACY.**

3 It is the sense of Congress that the Chief Counsel
4 for Advocacy of the Small Business Administration should
5 be permitted to appear as amicus curiae in any action or
6 case brought in a court of the United States for the pur-
7 pose of reviewing a rule.

8 **TITLE VII—REGULATORY**
9 **IMPACT ANALYSES**

10 **SEC. 7001. SHORT TITLE.**

11 This title may be cited as the “Administrative Proce-
12 dure Reform Act of 1995”.

13 **SEC. 7002. RULE MAKING NOTICES FOR MAJOR RULES.**

14 Section 553 of title 5, United States Code, is amend-
15 ed by adding at the end the following:

16 “(f)(1)(A) The head of an agency shall publish in the
17 Federal Register, at least 90 days before the date of publi-
18 cation of general notice under subsection (b) for a pro-
19 posed major rule, a notice of intent to engage in rule mak-
20 ing.

21 “(B) A notice under subparagraph (A) for a proposed
22 major rule shall include, to the extent possible, the infor-
23 mation required to be included in a Regulatory Impact
24 Analysis for the rule under section 7004(c) (1), (2), and
25 (8) of the Administrative Procedure Reform Act of 1995.

1 “(2) The head of an agency shall include in a general
2 notice under subsection (b) for a major rule proposed by
3 the agency—

4 “(A) a final Regulatory Impact Analysis for the
5 rule prepared in accordance with section 7004 of the
6 Administrative Procedure Reform Act of 1995; and

7 “(B) clear delineation of all changes in the in-
8 formation included in the final Regulatory Impact
9 Analysis under section 7004(c)(1) and (2) of the Ad-
10 ministrative Procedure Reform Act of 1995 from
11 any such information that was included in the notice
12 for the rule under paragraph (1)(B) of this sub-
13 section.

14 “(3) In this subsection, the term ‘major rule’ has the
15 meaning given that term in section 7004(b) of the Admin-
16 istrative Procedure Reform Act of 1995.”

17 **SEC. 7003. HEARING REQUIREMENT FOR PROPOSED**
18 **RULES; EXTENSION OF COMMENT PERIOD.**

19 (a) HEARING REQUIREMENT.—Section 553 of title 5,
20 United States Code, is further amended—

21 (1) in subsection (b), in the matter following
22 paragraph (3), by inserting “(except subsection
23 (g))” after “this subsection”; and

24 (2) by adding after subsection (f) (as added by
25 section 7002 of this title) the following:

1 “(g) If more than 100 interested persons acting indi-
2 vidually submit comments to an agency regarding any rule
3 proposed by the agency, the agency shall hold a public
4 hearing on the proposed rule.”.

5 (b) EXTENSION OF COMMENT PERIOD.—Section 553
6 of title 5, United States Code, is further amended by add-
7 ing after subsection (g) (as added by subsection (a)(2) of
8 this section) the following:

9 “(h) If during the 30-day period beginning on the
10 date of publication of notice under subsection (f)(1)(A) for
11 a proposed major rule, or if during the 30-day period be-
12 ginning on the date of publication or service of notice re-
13 quired by subsection (b) for a proposed rule, more than
14 100 persons individually contact the agency to request an
15 extension of the period for making submissions under sub-
16 section (c) pursuant to the notice, the agency—

17 “(1) shall provide an additional 30-day period
18 for making those submissions; and

19 “(2) may not adopt the rule until after that ad-
20 ditional period.”.

21 (c) RESPONSE TO COMMENTS.—Section 553(c) of
22 title 5, United States Code, is amended—

23 (1) by inserting “(1)” after “(c)”; and

24 (2) by adding at the end the following:

1 “(2) The head of an agency shall publish in the Fed-
2 eral Register with each rule published under section
3 552(a)(1)(D) of this title, responses to the substance of
4 the comments received by the agency regarding the rule.”.

5 **SEC. 7004. REGULATORY IMPACT ANALYSIS.**

6 (a) APPLICATION OF EXECUTIVE ORDER AS STATU-
7 TORY REQUIREMENT.—Except as otherwise provided in
8 this section, Executive Order 12291 (relating to Federal
9 regulation requirements and regulatory impact analysis),
10 as in effect on September 29, 1993, shall apply to each
11 agency in accordance with the provisions of the Order.

12 (b) DEFINITION OF MAJOR RULE IN ORDER.—Not-
13 withstanding section 1(b) of the Order, for purposes of
14 subsection (a) of this section, the term “major rule”
15 means any proposed rulemaking—

16 (1) which affects more than 100 persons; or

17 (2) compliance with which will require the ex-
18 penditure of more than \$1,000,000 by any single
19 person which is not a Federal agency.

20 (c) CONTENTS OF REGULATORY IMPACT ANALY-
21 SES.—In lieu of the information specified in section 3(d)
22 of the Order, each preliminary and final Regulatory Im-
23 pact Analysis required under section 3 of the Order for
24 a rule shall contain the following:

1 (1) An explanation of the necessity, appro-
2 priateness and reasonableness of the rule.

3 (2) A description of the current condition that
4 the rule will address and how that condition will be
5 affected by the rule.

6 (3) A statement that the rule does not conflict
7 with nor duplicate any other rule, or an explanation
8 of why the conflict or duplication exists.

9 (4) A statement of whether the rule is in accord
10 with or in conflict with any legal precedent.

11 (5) A statement of the factual, scientific, or
12 technical basis for the agency's determination that
13 the rule will accomplish its intended purpose.

14 (6) A statement that describes and, to the ex-
15 tent practicable, quantifies the risks to human
16 health or the environment to be addressed by the
17 rule.

18 (7) A demonstration that the rule provides the
19 least costly or least intrusive approach for meeting
20 its intended purpose.

21 (8) A description of any alternative approaches
22 considered by the agency or suggested by interested
23 persons and the reasons for their rejection.

24 (9) An estimate of the nature and number of
25 persons to be regulated or affected by the rule.

1 (10) An estimate of the economic costs of the
2 rule, including those incurred by persons in comply-
3 ing with the rule.

4 (11) An evaluation of the costs versus the bene-
5 fits derived from the rule, including evaluation of
6 how those benefits outweigh the cost.

7 (12) Whether the rule will require onsite inspec-
8 tions.

9 (13) An estimate of the paperwork burden on
10 persons regulated or affected by the rule, such as
11 the number of forms, impact statements, surveys,
12 and other documents required to be completed by
13 the person under the rule.

14 (14) Whether persons will be required by the
15 rule to maintain any records which will be subject to
16 inspection.

17 (15) Whether persons will be required by the
18 rule to obtain licenses, permits, or other certifi-
19 cations, and the fees and fines associated therewith.

20 (16) Whether persons will be required by the
21 rule to appear before the agency.

22 (17) Whether persons will be required by the
23 rule to disclose information on materials or proc-
24 esses, including trade secrets.

1 (18) Whether persons will be required by the
2 rule to report any particular type of incidents.

3 (19) Whether persons will be required by the
4 rule to adhere to design or performance standards.

5 (20) Whether persons may need to retain or
6 utilize any lawyer, accountant, engineer, or other
7 professional consultant in order to comply with the
8 regulations.

9 (21) An estimate of the costs to the agency for
10 implementation and enforcement of the regulations.

11 (22) Whether the agency can be reasonably ex-
12 pected to implement the rule with the current level
13 of appropriations.

14 (23) A statement that any person may submit
15 comments on the Regulatory Impact Analysis to the
16 Administrator of the Office of Information and Reg-
17 ulatory Affairs.

18 The requirements of this section shall be consistent
19 with, and not duplicative of, the requirements of section
20 3201.

21 (d) DEFINITIONS.—In this section—

22 (1) the term “Order” means Executive Order
23 12291, as in effect on September 29, 1993; and

24 (2) each of the terms “agency”, “regulation”,
25 and “rule” has the meaning given that term in sec-

1 tion 1 of the Order, except that the term "agency"
2 includes an independent agency.

3 **SEC. 7005. ADDITIONAL RESPONSIBILITIES OF DIRECTOR**
4 **OF THE OFFICE OF MANAGEMENT AND**
5 **BUDGET.**

6 An agency may not adopt a major rule unless the
7 final Regulatory Impact Analysis for the rule is approved
8 in writing by the Director of the Office of Management
9 and Budget or by an individual designated by the Director
10 for that purpose.

11 **SEC. 7006. STANDARD OF CLARITY.**

12 To the extent practicable, the head of an agency may
13 not publish in the Federal Register any proposed major
14 rule, summary of a proposed major rule, or Regulatory
15 Impact Analysis unless the Director of the Office of Man-
16 agement and Budget certifies that the proposed major
17 rule, summary, or Analysis—

18 (1) is written in a reasonably simple and under-
19 standable manner and is easily readable;

20 (2) is written to provide adequate notice of the
21 content of the rule, summary, or Analysis to affected
22 persons and interested persons that have some sub-
23 ject matter expertise;

24 (3) conforms to commonly accepted principles
25 of grammar;

1 (4) contains only sentences that are as short as
2 practical and organized in a sensible manner; and

3 (5) to the extent practicable, does not contain
4 any double negatives, confusing cross references,
5 convoluted phrasing, unreasonably complex lan-
6 guage, or term of art or word with multiple mean-
7 ings that may be misinterpreted and is not defined
8 in the rule, summary, or analysis, respectively.

9 **SEC. 7007. REPORT BY OIRA.**

10 The Director of the Office of Management and Budg-
11 et shall submit a report to the Congress no later than 24
12 months after the date of the enactment of this Act con-
13 taining an analysis of rule making procedures of Federal
14 agencies and an analysis of the impact of those rule mak-
15 ing procedures on the regulated public and regulatory
16 process.

17 **SEC. 7008. DEFINITIONS.**

18 For purposes of this title—

19 (1) except as provided in section 7004(d)(2),
20 each of the terms “agency”, “rule”, and “rule mak-
21 ing” has the meaning given that term in section 551
22 of title 5, United States Code; and

23 (2) the term “major rule” has the meaning
24 given that term in section 7004(b).

1 **TITLE** **VIII—PROTECTION**
2 **AGAINST FEDERAL REGU-**
3 **LATORY ABUSE**
4 **Subtitle A—Citizens' Regulatory**
5 **Bill of Rights**

6 **SEC. 8101. CITIZENS' REGULATORY BILL OF RIGHTS.**

7 (a) **IN GENERAL.**—Except as provided in subsection
8 (c), each person that is the target of a Federal investiga-
9 tive or enforcement action shall, upon the initiation of an
10 inspection, investigation, or other official proceeding di-
11 rected against that person, have the right—

12 (1) to remain silent;

13 (2) to be advised as to whether the person has
14 a right to a warrant;

15 (3) to be warned that statements can be used
16 against them;

17 (4) to have an attorney or accountant present;

18 (5) to be informed as to the scope and purpose
19 of the agency action;

20 (6) to be present at the inspection, investiga-
21 tion, or proceeding;

22 (7) to be reimbursed for unreasonable damages;

23 (8) to be free of unreasonable seizures of prop-
24 erty or assets; and

1 (9) to receive attorneys fees and other expenses
2 from the Government when the Government com-
3 mences a frivolous civil action against such person,
4 except that nothing in this paragraph shall be con-
5 strued to affect the Equal Access to Justice Act.

6 (b) AGENCY RULES.—Each agency or other authority
7 of the Federal Government with respect to which this sec-
8 tion applies shall make appropriate rules within 90 days
9 after the date of the enactment of this Act to implement
10 this section in the context of that agency's functions.

11 (c) LIMITATION ON APPLICATION OF REQUIRE-
12 MENTS.—A requirement of this section shall not apply if
13 compliance with the requirement would—

14 (1) substantially delay responding to an immi-
15 nent danger to person or property; or

16 (2) substantially or unreasonably impede a
17 criminal investigation.

18 **Subtitle B—Private Sector** 19 **Whistleblowers' Protection**

20 **SEC. 8201. SHORT TITLE.**

21 This subtitle may be cited as the “Private Sector
22 Whistleblowers' Protection Act of 1995”.

23 **SEC. 8202. PURPOSE.**

24 The Federal regulatory system should be imple-
25 mented consistent with the principle that any person sub-

1 ject to Government regulation should be protected against
2 reprisal for disclosing information that the person believes
3 is indicative of—

4 (1) violation or inconsistent application of any
5 law, rule, regulation, policy, or internal standard;

6 (2) arbitrary action or other abuse of authority;

7 (3) mismanagement;

8 (4) waste or misallocation of resources;

9 (5) inconsistent, discriminatory or disproportion-
10 ate enforcement proceedings;

11 (6) endangerment of public health or safety;

12 (7) personal favoritism; and

13 (8) coercion for partisan political purposes;

14 by any agency or its employees.

15 **SEC. 8203. COVERAGE.**

16 This subtitle shall apply to:

17 (1) Any agency of the Federal Government as
18 defined in section 551 of title 5, United States Code.

19 (2) Any agency of a State government that ex-
20 ercises authority under Federal law, or that exer-
21 cises authority under State law establishing a pro-
22 gram approved by a Federal agency as a substitute
23 for or supplement to a program established by Fed-
24 eral law.

1 **SEC. 8204. PROHIBITED REGULATORY PRACTICES.**

2 (a) **DEFINED.**—For purposes of this subtitle, “pro-
3 hibited regulatory practice” means any action described
4 in subsection (b)(i), (ii), or (iii) of this section.

5 (b) **PROHIBITION.**—(1) No employee of an Agency
6 who has authority—

7 (A) to take or direct other employees to take,

8 (B) to recommend, or

9 (C) to approve,

10 any regulatory action shall—

11 (i) take or fail to take, or threaten to take or
12 fail to take,

13 (ii) recommend or direct that others take or fail
14 to take, or threaten to so recommend or direct, or

15 (iii) approve the taking or failing to take, or
16 threaten to so approve,

17 such regulatory action because of any disclosure by a per-
18 son subject to the action, or by any other person, of infor-
19 mation that the person believed indicative of—

20 (I) violation or inconsistent application of any
21 law, rule, regulation, policy, or internal standard;

22 (II) arbitrary action or other abuse of author-
23 ity;

24 (III) mismanagement;

25 (IV) waste or misallocation of resources;

- 1 (V) inconsistent, discriminatory or disproportion-
2 ate enforcement;
- 3 (VI) endangerment of public health or safety;
- 4 (VII) personal favoritism; or
- 5 (VIII) coercion for partisan political purposes;
- 6 by any agency or its employees.

7 (2) An action shall be deemed to have been taken,
8 not taken, approved, or recommended because of the dis-
9 closure of information within the meaning of paragraph
10 (1) if the disclosure of information was a contributing fac-
11 tor to the decision to take, not to take, to approve, or to
12 recommend.

13 **SEC. 8205. PROHIBITED REGULATORY PRACTICE AS A DE-**
14 **FENSE TO AGENCY ACTION.**

15 (a) **IN GENERAL.**—In any administrative or judicial
16 action or proceeding, formal or informal, by an agency to
17 create, apply or enforce any obligation, duty or liability
18 under any law, rule or regulation against any person, the
19 person may assert as a defense that the agency or one
20 or more employees of the agency have engaged in a prohib-
21 ited regulatory practice with respect to the person or to
22 a related entity in connection with the action or proceed-
23 ing.

24 (b) **COMPLIANCE.**—If the existence of a prohibited
25 regulatory practice is established, the person may be re-

1 quired to comply with the obligation, duty or liability to
2 the extent compliance is required of and enforced against
3 other persons similarly situated, but no penalty, fine, dam-
4 ages, costs or other obligation except compliance shall be
5 imposed on the person.

6 **SEC. 8206. ENFORCEMENT.**

7 (a) **CIVIL PENALTY.**—Any agency, and any employee
8 of an agency, engaging in a prohibited regulatory practice
9 may be assessed a civil penalty of not more than \$25,000
10 for each such practice. In the case of a continuing prohib-
11 ited regulatory practice, each day that the practice contin-
12 ues shall be deemed a separate practice.

13 (b) **PROCEDURES.**—The President shall, by regula-
14 tion, establish procedures providing for the administrative
15 enforcement of the requirements of subsection (a) of this
16 section.

17 **SEC. 8207. CITIZEN SUITS.**

18 (a) **COMMENCEMENT.**—Any person injured or threat-
19 ened by a prohibited regulatory practice may commence
20 a civil action on his own behalf against any person or
21 agency alleged to have engaged in or threatened to engage
22 in such practice.

23 (b) **JURISDICTION AND VENUE.**—Any action under
24 subsection (a) of this section shall be brought in the dis-
25 trict court for any district in which the alleged prohibited

1 regulatory practice occurred or in which the alleged injury
2 occurred. The district court shall have jurisdiction, with-
3 out regard to the amount in controversy or the citizenship
4 of the parties, to—

5 (1) restrain any agency or person who has en-
6 gaged or is engaging in any prohibited regulatory
7 practice;

8 (2) order the cancellation or remission of any
9 penalty, fine, damages, or other monetary assess-
10 ment that resulted from a prohibited regulatory
11 practice;

12 (3) order the rescission of any settlement that
13 resulted from a prohibited regulatory practice;

14 (4) order the issuance of any permit or license
15 that has been denied or delayed as a result of a pro-
16 hibited regulatory practice;

17 (5) order the agency and/or the employee en-
18 gaging in a prohibited regulatory practice to pay to
19 the injured person such damages as may be nec-
20 essary to compensate the person for any harm re-
21 sulting from the practice, including damages for—

22 (A) injury to, deterioration of, or destruc-
23 tion of real or personal property;

1 (B) loss of profits from idle or
2 underutilized resources, and from business for-
3 gone;

4 (C) costs incurred, including costs of com-
5 pliance where appropriate;

6 (D) loss in value of a business;

7 (E) reasonable legal, consulting and expert
8 witness fees; or

9 (F) payments to third parties;

10 (6) order the payment of punitive damages, in
11 an amount not to exceed \$25,000 for each such pro-
12 hibited regulatory practice, provided that, in the case
13 of a continuing prohibited regulatory practice, each
14 day that the practice continues shall be deemed a
15 separate practice.

16 **SEC. 8208. OFFICE OF THE SPECIAL COUNSEL.**

17 (a) **REQUEST FOR INVESTIGATION.**—Any person who
18 has reason to believe that any employee of any agency has
19 engaged in a prohibited regulatory practice may request
20 the Special Counsel established by section 1211 of title
21 5, United States Code, to investigate.

22 (b) **POWERS.**—The Special Counsel shall have the
23 same power to investigate prohibited regulatory practices
24 that it has to investigate prohibited personnel practices
25 pursuant to section 1212 of title 5, United States Code.

1 **SEC. 8209. RELATION TO CRIMINAL INVESTIGATIONS.**

2 Nothing in this subtitle shall be construed so as sub-
3 stantially or unreasonably to impede a criminal investiga-
4 tion.

5 **TITLE IX—PRIVATE PROPERTY**
6 **RIGHTS PROTECTIONS AND**
7 **COMPENSATION**

8 **SEC. 9001. STATEMENT OF PURPOSE.**

9 It is the purpose of this title to compensate private
10 property owners with respect to certain actions that are
11 taken by the Federal Government for public purposes and
12 that limit the use of private property by property owners.

13 **SEC. 9002. COMPENSATION FOR FEDERAL AGENCY IN-**
14 **FRINGEMENT OR DEPRIVATION OF RIGHTS**
15 **TO PRIVATE PROPERTY.**

16 (a) **ELIGIBILITY.—**

17 (1) **IN GENERAL.—**A private property owner is
18 entitled to receive compensation from the United
19 States in accordance with this section for any agency
20 infringement or deprivation of rights to property
21 that is owned by the private property owner.

22 (2) **AGENCY INFRINGEMENT OR DEPRIVATION**
23 **OF RIGHTS TO PROPERTY DEFINED.—**For purposes
24 of paragraph (1), the term “agency infringement or
25 deprivation of rights to property” means a limitation
26 or condition that—

1 (A) is imposed by a final agency action on
2 a use of property that would be lawful but for
3 the agency action, and

4 (B) results in a reduction in the value of
5 the property equal to ten percent or more.

6 (3) CIRCUMSTANCES IN WHICH COMPENSATION
7 NOT REQUIRED.—A private property owner shall not
8 be entitled to receive compensation under this sub-
9 section for any of the following:

10 (A) A limitation on any action that would
11 constitute a violation of applicable State or local
12 law (including an action that would violate a
13 local zoning ordinance or would constitute a
14 nuisance under any applicable State or local
15 law).

16 (B) A limitation on any use of private
17 property, imposed pursuant to a determination
18 by the President that the use poses or would
19 pose a serious and imminent threat to public
20 health and safety or to the health and safety of
21 workers, or other individuals, lawfully on the
22 property.

23 (C) A limitation imposed pursuant to the
24 Federal navigational servitude.

1 (4) LIMITATION ON CUMULATIVE AMOUNT OF
2 COMPENSATION.—No payment may be made pursu-
3 ant to this subsection with respect to property if the
4 sum of such payment and all other payments made
5 pursuant to this subsection with respect to the prop-
6 erty would exceed the fair market value of the prop-
7 erty (as determined at the time of the payment).

8 (5) STATE OR LOCAL LIMITATIONS IMPOSED
9 PURSUANT TO FEDERAL MANDATES.—A limitation
10 or condition shall be considered to be a Federal
11 agency infringement or deprivation of rights to prop-
12 erty for purposes of paragraph (1) if it is a con-
13 sequence of a limitation or condition on the use of
14 the property by the private property owner that is
15 imposed by a State or local government pursuant to
16 an agency action that is intended to, or does, bind
17 the State or local government.

18 (b) REQUEST FOR COMPENSATION.—Within 90 days
19 after receipt of notice of an agency action with respect
20 to which compensation is required under subsection (a),
21 a private property owner may submit to the head of the
22 agency a request in writing for compensation under this
23 section.

24 (c) AGENCY DETERMINATION AND OFFER.—

1 (1) IN GENERAL.—Upon receipt of a request
2 for compensation, submitted in accordance with sub-
3 section (b), with respect to an agency action affect-
4 ing private property as described in subsection (a),
5 the head of the agency that took the action shall de-
6 termine whether the private property owner submit-
7 ting the request has demonstrated entitlement to
8 compensation under subsection (a). If the head of
9 the agency finds that the private property owner has
10 so demonstrated, the head of the agency shall offer
11 to compensate the private property owner for the re-
12 duction in the value of the property, as dem-
13 onstrated by the private property owner.

14 (2) TIMING OF DETERMINATION AND OFFER.—
15 The head of an agency shall make the determination
16 and offer, if any, required by paragraph (1) with re-
17 spect to a request for compensation not later than
18 180 days after receiving the request.

19 (d) PRIVATE PROPERTY OWNERS' RESPONSE.—A
20 private property owner shall have 60 days after the date
21 of receipt of an offer under subsection (c) to accept or
22 to reject the offer.

23 (e) ARBITRATION.—If the head of an agency deter-
24 mines, under subsection (c), that a private property owner
25 is not entitled to compensation under subsection (a), or

1 a private property owner rejects an offer made under sub-
2 section (c), the private property owner may submit the
3 matter for arbitration to an arbitrator appointed by the
4 head of the agency from a list of arbitrators submitted
5 by the American Arbitration Association. The arbitrator
6 shall determine whether the request meets the require-
7 ments of subsection (a) (if such determination is called
8 for by the submission of the property owner) and shall
9 determine the amount of compensation to which the prop-
10 erty owner is entitled under this section, in accordance
11 with subsection (c). The arbitration shall be conducted in
12 accordance with the real estate valuation arbitration rules
13 of that association. For purposes of this section, an arbi-
14 tration is binding on the head of an agency and the private
15 property owner as to whether the property owner is enti-
16 tled to compensation under subsection (a) and as to the
17 amount, if any, of compensation owed to the private prop-
18 erty owner under this section.

19 (f) PAYMENT.—The head of an agency shall pay a
20 private property owner any compensation required under
21 the terms of an offer of the agency head that is accepted
22 by the private property owner in accordance with sub-
23 section (d), or under a decision of an arbiter under sub-
24 section (e), by not later than 60 days after the date of

1 the acceptance or the date of the issuance of the decision,
2 respectively.

3 (g) NATURE OF REMEDY.—

4 (1) PROHIBITION OF LIMITATION ON OTHER
5 CLAIMS.—No provision of this title shall be con-
6 strued to limit the rights of any person to pursue
7 any claim or cause of action under the Constitution
8 or any other law (including a claim or cause of ac-
9 tion concerning personal property).

10 (2) PROHIBITION OF USE AS CONDITION
11 PRECEDENT.—Submission of a request for com-
12 pensation, or receipt of compensation, under this
13 title shall not be a condition precedent for any claim
14 or cause of action under any law.

15 (h) LIMITATION ON DOUBLE RECOVERY.—

16 (1) COURT AWARDS OF DAMAGES.—Notwith-
17 standing subsection (g), a court may credit a pay-
18 ment made pursuant to subsection (a) for any reduc-
19 tion in the value of property against the amount of
20 damages awarded pursuant to any claim or cause of
21 action, under the Constitution or any other law, that
22 arises from the same reduction in the value of the
23 same property.

24 (2) PAYMENTS UNDER THIS TITLE.—The
25 amount awarded pursuant to any claim or cause of

1 action, under the Constitution or any other law, for
2 any reduction in the value of a property shall be
3 credited against the amount of any payment made
4 pursuant to subsection (a) with respect to the same
5 reduction in the value of the same property.

6 (i) SOURCE OF PAYMENT FUNDS.—

7 (1) USE OF AGENCY FUNDS.—Except as pro-
8 vided in paragraphs (2) and (3), and notwithstand-
9 ing any other provision of law, any payment made
10 pursuant to subsection (a) shall be paid from the an-
11 nual appropriation of the agency or agencies taking
12 the action for which the payment is required. For
13 the purpose of making such a payment, the head of
14 the agency may transfer or reprogram any funds
15 available to the agency.

16 (2) ALTERNATIVE SOURCE OF FUNDS.—If the
17 agency taking the action referred to in paragraph
18 (2) or (5) of subsection (a) does not have sufficient
19 funds available to complete the payment required by
20 this section with respect to the action, the Comptrol-
21 ler General of the United States shall identify the
22 most appropriate Federal source of funds to com-
23 plete the payment and the President shall complete
24 the payment using funds from such source, notwith-
25 standing any other provision of law.

1 (3) **LAND EXCHANGE.**—In lieu of payment
2 under paragraph (1) or (2), the President may enter
3 into an agreement with the private property owner
4 who is entitled to the compensation for which the
5 payment is required to provide all or part of the
6 compensation by exchanging all or part of the af-
7 fected private property for property owned by the
8 United States and identified by the President as
9 suitable for such an exchange. The properties trans-
10 ferred as part of such an exchange shall be of equal
11 value, as determined under section 206(d) of the
12 Federal Land Policy and Management Act of 1976
13 (43 U.S.C. 1716(d)).

14 **SEC. 9003. SEVERABILITY.**

15 If any provision of this title, or the application thereof
16 to any person or circumstance, is held invalid, the remain-
17 der of this title and the application of such provision to
18 other persons and circumstances shall not be affected.

19 **SEC. 9004. DEFINITIONS.**

20 For purposes of this title:

21 (1) **AGENCY.**—The term “agency” has the
22 meaning given that term in section 551(1) of title 5,
23 United States Code.

1 (2) AGENCY ACTION.—The term “agency ac-
2 tion” has the meaning given that term in section
3 551(13) of title 5, United States Code.

4 (3) FAIR MARKET VALUE.—Unless stated other-
5 wise, the term “fair market value of the property”
6 means the fair market value of property determined
7 as of the date on which the private property owner
8 makes a claim under this title with respect to the
9 property.

10 (4) FINAL AGENCY ACTION.—The term “final
11 agency action” means an agency action that is in-
12 tended to or does bind a private property owner with
13 respect to the use of the property. Such term in-
14 cludes but is not limited to the following:

15 (A) Denial of a permit.

16 (B) Issuance of a cease and desist order.

17 (C) Issuance of a statement under section
18 7(b)(3) of the Endangered Species Act of 1973
19 (16 U.S.C. 1536(b)(3)).

20 (D) Issuance of a permit with conditions.

21 (E) Commencement of a civil or criminal
22 proceeding arising out of failure to secure a
23 permit.

24 (5) PRIVATE PROPERTY OWNER.—The term
25 “private property owner” means a person (other

1 than the United States, a department, agency, or in-
2 strumentality thereof, or an officer, employee, or
3 agent thereof when acting on behalf of his or her
4 employing authority) that—

5 (A) owns property referred to in paragraph
6 (6)(A); or

7 (B) holds property referred to in para-
8 graph (6)(B).

9 (6) PROPERTY.—The term “property” means—

10 (A) land; and

11 (B) the right to use or receive water.

12 (7) REDUCTION IN THE VALUE OF PROP-
13 ERTY.—The term “reduction in the value of prop-
14 erty” means the difference, if greater than zero, be-
15 tween—

16 (A) the fair market value of property, as
17 determined based on the value of the property
18 if an agency action referred to in paragraph (2)
19 or (5) of section 9002(a), as the case may be,
20 were not implemented; minus

21 (B) the fair market value of property, as
22 determined based on the value of the property
23 if an agency action referred to in paragraph (2)
24 or (5) of section 9002(a), as the case may be,
25 were implemented.

DRAFT

1/6/95

104TH CONGRESS
1ST SESSION**H. R. 450**

IN THE HOUSE OF REPRESENTATIVES

Mr. Delay and Mr. McIntosh introduced the following bill: which was referred to the Committee on _____

A BILL

To ensure economy and efficiency of Federal Government operations by establishing a moratorium on regulatory rulemaking actions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled.*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Regulatory Transition Act of 1995".

1 **SEC. 2. FINDING.**

2 The Congress finds that effective steps for improving the efficiency
3 and proper management of Government operations will be promoted if a
4 moratorium on new rulemaking actions is imposed and an inventory of such
5 actions is conducted.

6 **SEC. 3. MORATORIUM ON REGULATIONS.**

7 (a) **MORATORIUM.** --Until the end of the moratorium period,
8 a Federal agency may not take any regulatory rulemaking action, unless an
9 exception is provided under section 5. Beginning 30 days after the date of
10 enactment of this Act, the effectiveness of any regulatory rulemaking action
11 taken or made effective during the moratorium period but before the date
12 of the enactment shall be suspended until July 1, 1995, unless an exception
13 is provided under section 5.

14 (b) **INVENTORY OF RULEMAKINGS.** --Not later than 30 days
15 after the date of enactment of this Act, the President shall conduct an
16 inventory and publish in the Federal Register a list of all regulatory
17 rulemaking actions covered by subsection (a) taken or made effective
18 during the moratorium period but before the date of enactment.

19 **SEC. 4. SPECIAL RULE ON STATUTORY, REGULATORY AND**
20 **JUDICIAL DEADLINES.**

21 (a) **IN GENERAL.** --Any deadline for, relating to, or involving
22 any action dependent upon, any regulatory rulemaking action authorized or
23 required to be taken before the end of the moratorium period is extended.

24 (b) **EXTENSION PERIOD.** --Any deadline covered by subsection
25 (a) shall be extended for 5 months or until July 1, 1995, whichever is later.

26 (c) **DEADLINE DEFINED.** --The term "deadline" means any
27 date certain for fulfilling any obligation or exercising any authority
28 established by or under any Federal statute or regulation, or by or under
29 any court order implementing any Federal statute or regulation.

1 (d) IDENTIFICATION OF POSTPONED DEADLINES.--Not
2 later than 30 days after the date of enactment of this Act, the President
3 shall identify and publish in the Federal Register a list of deadlines covered
4 by subsection (a).

5 **SEC. 5. EMERGENCY EXCEPTIONS; EXCLUSIONS.**

6 (a) EMERGENCY EXCEPTION.--Section 3 (a) or 4 (a), or
7 both, shall not apply to a regulatory rulemaking action if--

8 (1) the head of a Federal agency otherwise authorized to take
9 the action submits a written request to the President, and a copy
10 thereof to the appropriate committees of each house of the Congress;
11 and

12 (2) the President finds, by Executive Order, that a waiver for
13 the action is (A) necessary because of an imminent threat to health
14 or safety or other emergency or (B) necessary for the enforcement
15 of criminal laws; and

16 (3) the Federal agency head publishes the finding and waiver
17 in the Federal Register.

18 (b) EXCLUSIONS.--The head of an agency shall publish in the
19 Federal Register any action excluded because of a certification under
20 section 6 (3)(B).

21 **SEC. 6. DEFINITIONS.**

22 For purposes of this Act--

23 (1) FEDERAL AGENCY.--The term "Federal agency"
24 means any "agency" as that term is defined in section 551(1) of title
25 5, United States Code (relating to administrative procedure).

26 (2) MORATORIUM PERIOD.--The term "moratorium
27 period" means that period of time beginning November 9, 1994, and
28 ending June 30, 1995.

29 (3) REGULATORY RULEMAKING ACTION.--

1 (A) IN GENERAL.--The term "regulatory rulemaking
2 action" means any rulemaking on any rule normally published
3 in the Federal Register, including--

4 (i) the issuance of any substantive rule,
5 interpretative rule, statement of agency policy, notice
6 of inquiry, advance notice of proposed rulemaking, or
7 notice of proposed rulemaking, and

8 (ii) any other action taken in the course of the
9 process of rulemaking (except a cost benefit analysis
10 or risk assessment, or both).

11 (B) EXCLUSIONS.--Such term does not include--

12 (i) any agency action that the head of the
13 agency certifies is limited to repealing, narrowing, or
14 streamlining a rule, regulation, or administrative
15 process or otherwise reducing regulatory burdens; or

16 (ii) any action that the head of the agency
17 certifies is limited to matters relating to military or
18 foreign affairs functions or a statute implementing any
19 international trade agreement, or agency management,
20 personnel, or public property, loans, grants, benefits
21 or contracts.

22 (4) RULE.--The term "rule" means the whole or a part of an
23 agency statement of general or particular applicability and future effect
24 designed to implement, interpret, or prescribe law or policy. Such term
25 does not include the approval or prescription, on a case-by-case or
26 consolidated case basis, for the future of rates, wages, corporate or
27 financial structures or reorganizations thereof, prices, facilities, appliances,
28 services or allowances therefor or of valuations, costs, or accounting, or
29 practices bearing on any of the foregoing. Such term also does not include

- 5 -

1 the granting an application for a license, registration, or similar authority,
2 granting or recognizing an exemption, granting a variance or petition for
3 relief from a regulatory requirement, or other action relieving a restriction,
4 or taking any action necessary to permit new or improved applications of
5 technology.

6 (5) RULEMAKING.--The term "rulemaking" means agency process
7 for formulating, amending, or repealing a rule.

8 (6) LICENSE.--The term "license" means the whole or part of an
9 agency permit, certificate, approval, registration, charter, membership,
10 statutory exemption or other form of permission.

11 **SEC. 7. CIVIL ACTION.**

12 In addition to any remedy otherwise available, whoever is adversely
13 affected by any conduct of a Federal agency in violation of section 3 or 4,
14 may obtain appropriate relief in a civil action against that agency. The
15 court may award a prevailing plaintiff in an action under this section
16 reasonable attorney's fees.

17 **SEC. 8. RELATIONSHIP TO OTHER LAW; SEVERABILITY.**

18 (a) APPLICABILITY.--This Act shall apply notwithstanding any
19 other provision of law.

20 (b) SEVERABILITY.--If any provision of this Act, or the
21 application of any provision of this Act to any person or circumstance, is
22 held invalid, the application of such provision to other persons or
23 circumstances, and the remainder of this Act, shall not be affected thereby.

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Constitutional Problems Under Lincoln

Revised Edition

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“dictum” to the contrary) Congress acted in the interest of freedom. Slavery in the District of Columbia was abolished, with compensation to loyal owners, on April 16, 1862; and emancipation in the territories (but without compensation) was provided by act of June 19, of the same year.⁴⁷

v

Our attention must now turn to that form of emancipation which Lincoln favored in preference to any other because it came nearest to satisfying his sense of what was statesmanlike, equitable, and legally sound. This was gradual emancipation by voluntary action of the States with Federal coöperation and compensation. In recommending, on March 6, 1862,⁴⁸ that Congress should pass a resolution pledging financial aid for this purpose, the President pointed out that the matter was one of perfectly free choice with the States; and that his proposition involved “no claim of a right by Federal authority to interfere with slavery within State limits, referring, as it does, the absolute control of the subject . . . to the State and its people.” Lincoln was too good a lawyer to ignore the constitutional limitations as to the power of Congress over slavery in the States, and the legal importance of the vested rights of slave owners which called for compensation. On

⁴⁷*U. S. Stat. at Large*, XII, 376, 432, 538, 665. In an able analysis of the Dred Scott case, E. S. Corwin has shown that Taney's denial of congressional power to prohibit slavery in the territories was not an “obiter dictum,” but a canvassing afresh of the question of jurisdiction. He points out, however, the irrelevancy of Taney's argument in invoking the doctrine of “vested rights” in the interpretation of the “due process” clause, and thus denouncing the Missouri Compromise as a violation of the Fifth Amendment. (*Am. Hist. Rev.*, XVII, 52-69.)

⁴⁸*Cong. Globe*, 37 Cong., 2 sess., p. 1102.

April 10, 1862, Congress passed the following resolution,⁴⁹ in the identical form proposed by the President.

Be it resolved . . . That the United States ought to cooperate with any State which may adopt gradual abolishment of slavery, giving to such State pecuniary aid, to be used by such State in its discretion, to compensate for the inconveniences, public and private, produced by such a change of system.

This joint resolution was directed primarily to the border States, but it offered pecuniary assistance to any State that should abolish slavery. An unfavorable reply to the proposal was made by a congressional delegation from the border States,⁵⁰ and the scheme was never carried out. It came very near, however, to being put to a practical test in Missouri. Even before that State had passed an emancipation law, both houses of Congress passed bills giving actual financial aid to the State for the purpose of emancipation. The bills disagreed in form, and time was lacking in the short session ending in March, 1863, to perfect and pass the same bill through the two houses; but the affirmative action of both houses on the actual appropriation of money is significant of the serious purpose of Congress to fulfill the Federal side of the proposal.⁵¹

Five months after the initiation of the scheme for compensated abolition, the executive proclamation of emancipation, which we will consider on a later page,

⁴⁹*Ibid.*, Appendix, p. 420.

⁵⁰*Ann. Cyc.*, 1862, p. 722.

⁵¹In the House bill Federal bonds to the amount of ten million dollars were provided. The Senate bill provided bonds up to twenty million dollars; but, if emancipation should not be effected before July 4, 1865, the amount to be delivered was to be only ten million. (*Cong. Globe*, Jan. 6, 1863, 37 Cong., 3 sess., p. 209; *Senate Journal*, Feb. 12, 1863, p. 243.)

was issued (September 22, 1862). The proclamation, however, did not apply in the border States, nor universally within the Confederate States; and its issuance by no means indicated an abandonment of the scheme for State abolition with Federal compensation. In the September proclamation the President specifically declared his intention to "recommend the adoption of a practical measure tendering pecuniary aid" to loyal slave States voluntarily adopting immediate or gradual abolishment. The compensation scheme was his idea of the proper method for the permanent eradication of slavery, while the proclamation was a measure of partial application whose legal effect after the war he regarded as doubtful.

As a side light on the President's policy of making compensation to slave owners, it is interesting to study a general order concerning the military use of property and slaves in the Southern States, which he issued on the very day when the Emancipation Proclamation was broached in Cabinet meeting (July 22, 1862). He ordered that property be used where necessary for military purposes, but that "none shall be destroyed in wantonness or malice." He further directed "that . . . commanders employ . . . so many persons of African descent as can be advantageously used for military or naval purposes, giving them reasonable wages for their labor," and ordered "that, as to both property and persons of African descent, accounts shall be kept . . . as a basis upon which compensation can be made in proper cases." This order was written in Lincoln's handwriting and was issued as a general order by the War Department.⁵² It is of interest as showing how the President, while occupied with the subject of emancipa-

⁵²Stanton Papers, VIII, No. 51769; O. R., Ser. III, Vol. 2, p. 397; Nicolay and Hay, *Works*, VII, 287.

tion by proclamation, was at the same time mindful of the property rights of slave owners.

In his annual message of December 1, 1862, Lincoln presented at some length a detailed project for compensated emancipation which he wished to have adopted as articles amendatory of the Constitution. These proposed amendments provided for the delivery of United States bonds to every State which should abolish slavery before the year 1900. All slaves made free by the chances of war were to be forever free, but loyal owners of such slaves were to be compensated. The President, in this message, argued elaborately and eloquently for the adoption of his scheme.⁵³

An examination of this able message reveals much concerning the legal phases of emancipation as viewed by the President. He treated the subject of the liberation of slaves as one still to be decided, showing that he did not regard the Emancipation Proclamation as a settlement or solution of the question in the large sense. State action was still to be relied upon for the legal accomplishment of emancipation; and this was in harmony with the statement which the President is reported to have made in his interview with the border-State delegation on March 10, 1862, "that emancipation was a subject exclusively under the control of the States, and must be adopted or rejected by each for itself; that he did not claim, nor had this Government any right to coerce them for that purpose."⁵⁴

The message shows further that he considered compensation the correct procedure; and believed that such compensation by the Federal Government, the expense of which would be borne by the whole country, was

⁵³Nicolay and Hay, *Works*, VIII, 93-131.

⁵⁴McPherson, *Political History of the Rebellion*, 210 et seq.

equitable. He would set constitutional discussions at rest by writing his plan of liberation (even to the amount and interest rate of the bonds and the terms of their delivery) into the fundamental law. Yet, though he was proceeding by constitutional amendment, his method was not to emancipate by purely national action; for the matter was still to be left to the States and would apply only in those States which should choose to coöperate. It was to be voluntary emancipation by the States with compensation by the nation. For even so much national action as was involved in "coöperation" with States desiring to give freedom to their slaves, Lincoln favored the adoption of a constitutional amendment, though this financial "coöperation" is the sort of thing that Congress nowadays regards as a part of an ordinary day's work.

We need not, of course, conclude that the President, in his own mind, doubted the constitutionality of the proposal for compensated emancipation; though, as we have seen, he did doubt the constitutional power of Congress to impose liberation upon a State. He said in communicating his original proposal to the border-State delegation that his proposition, since it merely contemplated cooperation with States which should voluntarily act, involved no constitutional difficulty.⁵⁵ In his December message he made no reference to any defect in the constitutional power of Congress to act as he proposed. The plain inference is, not that the President considered an amendment necessary to legalize his project; but that he wished the scruples of those who did think so satisfied, and also that he wished so grave and important a matter to be dealt with by a solemn, fundamental, act.

⁵⁵Nicolay and Hay, *Works*, VII, 125-126.

Since this project for State abolition with Federal aid was never adopted, we need not dwell further upon the many interesting questions which it presented. Perhaps its chief interest is to be found in the light it throws upon Lincoln's lawyerlike caution in dealing with the slavery question as a matter of permanent law.

All these cautious legal considerations in Lincoln's mind and this circumspection in his official acts should not be regarded as dimming his intense conviction as to the moral wrong and shameful social abuse of slavery.

To review his works is to find emphatic and numerous expressions of this conviction. Space is lacking for a full showing of these statements, but a few typical ones may be noted here. In 1854: "This declared indifference . . . for the spread of slavery, I cannot but hate. I hate it because of the monstrous injustice of slavery itself. I hate it because it . . . enables the enemies of free institutions . . . to taunt us as hypocrites" In 1855: "I hate to see the poor creatures hunted down and caught" In 1859: "Never forget that we have before us this whole matter of the right or wrong of slavery in this Union" In 1864: "I am naturally antislavery. If slavery is not wrong, nothing is wrong. I cannot remember when I did not so think and feel" ⁶⁶ These sentiments were among the deep fundamentals of Lincoln's liberal thought.

⁶⁶For these statements see Nicolay and Hay, *Works*, II, 205, 282; V, 122; X, 65. For a full and useful compilation of Lincoln's many utterances on slavery (with references), see Archer H. Shaw, ed., *Lincoln Encyclopedia*, 298-339.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
JAN 12 1995

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

MEMORANDUM FOR REGULATORY WORKING GROUP

FROM: Sally Katzen *SK*
SUBJECT: Principles for Risk Analysis

Attached is a statement of policy on risk assessment, management and communication. The principles are designed to define risk analysis and its purposes, and to generally guide agencies as they use risk analysis in the regulatory context. They are intended to provide a general framework -- a structure stating basic principles upon which a wide consensus now exists.

The principles are aspirational rather than prescriptive. Their application requires flexibility and practical judgment. The science of risk assessment is rapidly changing and its use is a function of a number of factors -- including legal mandates and available resources -- that vary from one regulatory program to another. We therefore do not offer these principles as conclusive, complete or irrevocable; they are intended to be used as a point of departure for future efforts within individual agencies and the Executive Branch broadly.

The principles should be interpreted and applied as a whole. Particular sections should not be quoted or extracted in isolation. The principles are not intended to provide the basis for judicial review or legislation.

Principles for Risk Assessment, Management, and Communication

**Regulatory Working Group
Subgroup on Risk Analysis**

A. General Principles

1. These Principles are intended to be goals for agency activities with respect to the assessment, management, and communication of environmental, health, and safety risks. Agencies should recognize that risk analysis is a tool — one of many, but nonetheless an important tool — in the regulatory tool kit. These Principles are intended to provide a general policy framework for evaluating and reducing risk, while recognizing that risk analysis is an evolving process and agencies must retain sufficient flexibility to incorporate scientific advances.
2. The principles in this document are intended to be applied and interpreted in the context of statutory policies and requirements, and Administration priorities.
3. As stated in Executive Order No. 12866, "In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction" [Section 1(b)(4)]. Further, in developing regulations, federal agencies should consider "...how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency" [Section 4(c)(1)(D)].
4. In undertaking risk analyses, agencies should establish and maintain a clear distinction between the identification, quantification, and characterization of risks, and the selection of methods or mechanisms for managing risks. Such a

distinction, however, does not mean separation. Risk management policies may induce changes in human behaviors that can alter risks (i.e., reduce, increase, or change their character), and these linkages must be incorporated into evaluations of the effectiveness of such policies.

5. The depth or extent of the analysis of the risks, benefits and costs associated with a decision should be commensurate with the nature and significance of the decision.

B. Principles for Risk Assessment

1. Agencies should employ the best reasonably obtainable scientific information to assess risks to health, safety, and the environment.
2. Characterizations of risks and of changes in the nature or magnitude of risks should be both qualitative and quantitative, consistent with available data. The characterizations should be broad enough to inform the range of policies to reduce risks.
3. Judgments used in developing a risk assessment, such as assumptions, defaults, and uncertainties, should be stated explicitly. The rationale for these judgments and their influence on the risk assessment should be articulated.
4. Risk assessments should encompass all appropriate hazards (e.g., acute and chronic risks, including cancer and non-cancer risks, to human health and the environment). In addition to considering the full population at risk, attention should be directed to subpopulations that may be particularly susceptible to such risks and/or may be more highly exposed.
5. Peer review of risk assessments can ensure that the highest professional standards are maintained. Therefore, agencies should develop policies to maximize its use.
6. Agencies should strive to adopt consistent approaches to evaluating the risks posed by hazardous agents or events.

C. Principles for Risk Management

1. In making significant risk management decisions, agencies should analyze the distribution of the risks and the benefits and costs (both direct and indirect, both quantifiable and non-quantifiable) associated with the selection or implementation of risk management strategies. Reasonably feasible risk management strategies, including regulation, positive and negative economic incentives, and other ways to encourage behavioral changes to reduce risks (e.g., information dissemination), should be evaluated. Agencies should employ the best available scientific, economic and policy analysis, and such analyses should include explanations of significant assumptions, uncertainties, and methods of data development.
2. In choosing among alternative approaches to reducing risk, agencies should seek to offer the greatest net improvement in total societal welfare, accounting for a broad range of relevant social and economic considerations such as equity, quality of life, individual preferences, and the magnitude and distribution of benefits and costs (both direct and indirect, both quantifiable and non-quantifiable).

D. Principles for Risk Communication

1. Risk communication should involve the open, two-way exchange of information between professionals, including both policy makers and "experts" in relevant disciplines, and the public.
2. Risk management goals should be stated clearly, and risk assessments and risk management decisions should be communicated accurately and objectively in a meaningful manner. To maximize public understanding and participation in risk-related decisions, agencies should:
 - a. explain the basis for significant assumptions, data, models, and inferences used or relied upon in the assessment or decision;

- b. describe the sources, extent and magnitude of significant uncertainties associated with the assessment or decision;
- c. make appropriate risk comparisons, taking into account, for example, public attitudes with respect to voluntary versus involuntary risks; and,
- d. provide timely, public access to relevant supporting documents and a reasonable opportunity for public comment.

E. Principles for Priority Setting Using Risk Analysis

1. To inform priority setting, agencies should seek to compare risks, grouping them into broad categories of concern (e.g., high, moderate, and low).
2. Agencies should set priorities for managing risks so that those actions resulting in the greatest net improvement in societal welfare are taken first, accounting for relevant management and social considerations such as different types of health or environmental impacts; individual preferences; the feasibility of reducing or avoiding risks; quality of life; environmental justice; and the magnitude and distribution of both short- and long-term benefits and costs.
3. The setting of priorities should be informed by internal agency experts and a broad range of individuals in state and local government, industry, academia, and nongovernmental organizations, as well as the public at large. Where possible, consensus views should be reflected in the setting of priorities.
4. Agencies should attempt to coordinate risk reduction efforts wherever feasible and appropriate.

**REGULATORY WORKING GROUP
MEETING**

January 12, 1995

AGENDA

- o Vice President's Regulatory Reform
 - Overall framework/status
 - "Cross-cutting" regulatory issues
 - Report on other meetings that have taken place to date
- o Legislative Issues
 - Various proposals and Administration response (status)
 - Agency Tasks
- o Agency Activities

**CROSS CUTTING ISSUES
AND
GENERAL REGULATORY APPROACHES**

Outline of issues addressed by the "Cross-Cutting Regulatory Issues" subgroup chaired by Sally Katzen:

1. Use of Performance Standards
2. Bubbles/Marketable Permits
3. Self-Certification and Self-Regulation
4. Use of Contractual Arrangements
 - a. Insurance-based approaches
 - b. Enforceable Contracts in Place of Regulation
5. Establish a Regulatory Budget
6. Enhance Public Participation
 - a. Reduce current barriers
 - b. Encourage more formal consultation
7. Streamline Paperwork
8. Provide incentives for agencies to review existing regulations
9. Revisit Federalism Issues
 - a. Summit of federal and state regulators in particular sectors to consider reallocating roles
 - b. Require each agency to nominate an area for devolution to the states
 - c. Waiver concept
10. Eliminate Statutory Deadlines
11. Use of Information
12. Introduction to Customer Service Issues

NRN

MEMORANDUM FOR THE VICE PRESIDENT

CC: THE CHIEF OF STAFF

THROUGH: ELAINE KAMARCK

FROM: NPR STAFF

SUBJECT: CUSTOMER SERVICE IN REGULATORY REFORM

American Airlines and the rest of the Miami trade community proclaim that they are big fans of the Customs Service -- at the same time, compliance with customs laws and regulations in the port of Miami is better than ever. This "best of both worlds" situation results from Customs treating business as a customer and forging a partnership aimed at goals worked out together. The Customs success and other small programs spread among regulating and enforcing agencies support the idea that a customer driven approach can produce better overall results than the command and control approach that dominates the way these agencies carry out their missions today.

The administration's customer service initiative, driven by the President's September 1993 executive order, "Setting Customer Service Standards," has brought more attention to partnering with those being regulated. Some regulators are collecting input on what these potential partners want and setting standards for what those partners can expect when they deal with the agency.

In some agencies customer-driven programs have been a small part of their overall approach for years. For example, OSHA began a consulting program for small business in the 1970s. Similar programs exist there today, but get much lower priority than enforcement receives.

The approach in Japan and Europe -- in Sweden, Germany, France, the UK and elsewhere -- is a partnership style. In these countries, the expectation is that when a compliance officer arrives at a businessperson's door, the officer will be a technical person there to help find and fix problems. Steven Kelman and James Q. Wilson independently concluded that the European approach gets results every bit as good as the US approach.

Where there is active cooperation between US government and business, information technology plays a big role. Customs and the trade community exchange data electronically, using the information both to clear low-risk shipments quickly and to target high-risk shipments for inspection. But with most regulators there is little or no electronic communication with those being regulated. The good news is that there is huge potential to apply information technology, especially in cooperative programs.

Evidence that customer-driven approaches work does not translate to management priorities and budget allocations, which put enforcement first. Industry complains loudly about the style of enforcement, designed, they say, to catch them in errors rather than protect workers on the environment. They add that our system puts no value on their contribution to the country's well being and future.

Indeed, this points out one of the basic decisions of the regulatory reform process. In the first phase of NPR, we faced a government operating system filled with checkers and micro-managers, and based on the mistrust of federal workers. We decided that the problem was the system, not the workers, and we set about to reinvent a tremendously inefficient system. A parallel decision about trusting business will open the door to a similar retooling of regulatory approaches and priorities.

Status of the President's Customer Service Initiative

In September 1993 President Clinton issued Executive Order 12862, "Setting Customer Service Standards." The Executive Order calls for a customer service "revolution within the Federal Government to change the way it does business." The Order covers all agencies serving individuals or entities. It lays out basic actions required, including identifying who the customers are, surveying them on what they want and whether they are satisfied, and publishing standards to tell customers what they can expect by way of service.

For regulatory agencies, defining their customers has been a source for much discussion. The typical situation is that an agency regulates entities that, in turn, affect the public. The question has been, "Who is the customer—the regulated entity or the public?" The NPR answer was don't choose, look at a business model for a parallel.

Ford's customers buy cars, but Ford sells cars through dealers. Ford can't sell cars without a dealer system that works smoothly. To get this they treat dealers like customers. They ask what dealers need and design programs to satisfy those needs. Regulatory agencies developing customer service standards worked with this "Ford" model. Some chose to call regulated entities customers, others called them partners. It doesn't matter much what they are called. What matters is that customer service principles are applied throughout the delivery system.

Throughout government efforts to collect customer input have certainly stepped up. In a major effort, the White House Conference on Small Business is running conferences in all states, leading up to a national conference this summer. They are getting an earful. Proposals include sunsetting, increased use of cost/benefit analysis, allowing time for good faith efforts at compliance, joint business and government development of regulations, and more. Conferees seem to complain more about the punitive approach to achieving current regulatory goals than about how regulations are developed. There are almost no issues about overall goals, like improved air quality.

A recent report from the Business Roundtable Report makes similar points to those of small business, but emphasizes the impact of the US style of regulation on the economy — “Just as the public must pay for government spending programs through higher taxes, they must also pay a high price for regulations - as customers, employees, and stockholders.” The report calls for twelve tenets of “rational regulation,” including: risk-based priorities and public education; risk assessment and risk management; sound science; benefit-cost analysis; market incentives and performance standards.

A series in the Kansas City Business Journal showed how much attention the regulation of business is drawing. The series, entitled Whose Business Is It, Anyway?, occupied five or more pages per week for five weeks. The basic message was that the way regulations are implemented squeezes the energy and opportunity out of business, instead of supporting business to meet the intent of the law in the safest and most productive way possible.

The series was based on a six-month effort that included interviews of more than 150 business owners, government officials, and legal and academic experts. Over and over the articles relate stories to make the point that the manner of enforcement the regulators use is the primary issue. For instance, they tell of an OSHA inspection of La Bonne Bouchee, which cited the bakery for violating the “lockout” standard because the switches on the ovens weren’t padlocked while they were being repaired. This could sound reasonable, except that the owner, who did much of the work himself, says he removed the fuses, and the appliances couldn’t possibly be activated. The punchline is that this was the first OSHA inspection of the bakery in 17 years, and rather than giving advice, OSHA assessed the baker \$1,250 for each of the three ovens.

OSHA isn’t the only agency covered in the articles. EPA and agencies implementing labor practice regulations get similar treatment. The KC series also spends time on the cost of regulations, direct and indirect. They estimate the indirect cost at \$1 trillion. To demonstrate the point, they relate stories of businesses closed, products not developed, and markets abandoned.

In writing customer service standards in response to the President’s executive order, some agencies tried to face the issue of how they deal with the entities they regulate. One of OSHA’s standards could change the baker’s story next time. They pledge to “work with business to help identify and control workplace hazards.” Indeed the OSHA standards compare favorably with the best in business goal of the order. Nine other regulators also came out with industrial strength standards. So far, twenty-three other regulators, including EPA, have committed to work on standards or work with business on the subject involved — in EPA’s case the scope was limited to permits. Another thirty-six agencies with regulatory roles have yet to put out any standards.

Alternatives to Command and Control -- US Agencies

US regulators actually have a lot of experience with alternative approaches to achieving regulatory goals -- voluntary partnerships between government, industry and the public.

As an alternative EPA put together the 33/50 program. This program seeks voluntary reductions in environmental releases and transfers of 17 pollutants reported in the Toxic Release Inventory (TRI). The goals were to reduce these toxins by 33% in 1992 and 50% in 1995, from a 1988 TRI baseline of 1.47 billion pounds of toxic wastes. Over 1200 manufacturers are participating. The data shows the program is ahead of schedule, with 1992 reductions of about 40% and the 1995 reductions expected to pass the 50% goal. And there are several other cooperative EPA programs: WastewiSe, Wave, Green Lights and the Common Sense Initiative.

OSHA has had small cooperative programs for years, where they help employers find and fix workplace hazards. In its Maine 200 and Wisconsin 100 pilot projects, OSHA gives help to employers that are considered high risk because of their injury rates. OSHA sends information packages to help employers and employees work together to improve health and safety conditions. Companies can also get technical advice from OSHA through state agencies. The programs offer free consultation services, including no-penalty inspections.

These voluntary programs often have impressive results, but typically they are not given high priority. In general, agencies still spend the majority of their resources on enforcement rather than helping regulated entities achieve compliance.

The Customs Service has gone much farther than most. It is absolutely convinced that treating business as a customer increases compliance. Customs meets constantly with its customers and other agencies. Working together, they speed the flow of passengers and cargo. Customs has also enlisted airlines and sea carriers to prevent drug smuggling. Air and sea carriers sign agreements committing to improve security, and Customs provides advice, written guidance, and training for carrier personnel on first rate security procedures. Air and sea carriers notify Customs of suspicious shipments and have provided Customs with the information to make hundreds of drug seizures.

Experience in Other Countries

In general, other economic powers work as a partner of those they regulate. DuPont Corporation, contrasting their experience here and in Europe, told us that, despite the same practices, procedures and diligence in both places, they are routinely fined in the United States, but almost never in Europe. Just last year, DuPont was fined 200 times in the US for health, safety and environmental issues, but only once in Europe.

Academic studies suggest that DuPont's experience is not unusual. Steven Kelman's study of Sweden's *Arbetskyddverket* (Worker Protection Board) and America's OSHA found that the "informal and cooperative Swedish system produced a level of compliance with safety and health rules that was as high or higher than that achieved by the formal and punitive American system.

Another study of Great Britain, Germany, France, Japan, and America, examining how the five nations regulate pesticides, food additives, and industrial chemicals, led to a conclusion similar to Kelman's conclusion about Sweden. James Q. Wilson summarized the results from all this work in *Bureaucracy*, saying "consensual European administrative practices essentially served the same goals and produced the same outcome as adversarial American practices."

Europeans also rely heavily on the consultative approach in the development of regulations. The trade press, in *Industrial Finishing* magazine, gives an example of a "harmonization" model—a triangle of cooperation between the government, the paint industry and the end-users. Each group has a voice in the preparation of legislation at both the national and international level. Although historically every country had its own paint association, now the industry has united to form the European Paintmakers' Association (CEPE), based in Brussels. The group coordinates chemical emission reductions from paint manufacturers and applicators. It claims that the government in Germany and the Netherlands, for example, "will not make rules without consulting relevant organizations and suppliers."

In Europe, the International Standards Organization runs the current program for ensuring quality procedures in industrial processes. Called ISO 9000, the program provides certification that businesses are performing up to certain established standards. In order to do business in Europe, US corporations routinely go through this certification process. Unlike traditional efforts to encourage compliance, however, ISO 9000 is a privately-run program, totally independent of government. It is a quality system self-imposed by the business community in order to protect itself. Now efforts are underway to establish ISO 14,000, which would establish standards to certify environmental performance. It is expected that ISO 14,000 will be adopted by business just as ISO 9000 was -- voluntarily.

As with ISO 9000, vendors and suppliers would work voluntarily to meet the standards in order to qualify for certification -- all without intervention by government. A system modeled on this European approach could substitute for a major portion of US federal enforcement and permitting activities. For starters, EPA could work with industry and the ISO to try this approach for selected corporations, where EPA compliance activities might be waived for a trial period, and an ISO-type system substituted.

The Potential of IT

A separate working group meeting, with its own background paper, will be devoted to this topic.

Proposals

These proposals are based on a fundamental change in philosophy that rejects mistrust of regulated entities, values the success of these entities, and replaces command and control with partnership. The proposals begin by going after how we implement current statutes and regulations.

Use Partnership to Promote Compliance

1. By executive order, direct agencies to follow the Miami model in their field operations, developing a strategic alliance with customers that is built on mutual trust and respect. Specifically,

- Local agency management will hold regular meetings among federal agencies, state agencies, local agencies, regulated entities, and the affected public.
- Information technology links will be set up to support doing business with the regulated entities.
- Agencies will judge the performance of field operations based on compliance, not on citations, fines or prosecutions. All agency management reports will be revised to track compliance and outcomes.
- Training and consultation will be provided to all regulated entities so they know how to comply.
- Enforcement priority will be put on the worst problems and no time spent on other problems until the big issues are dealt with.
- Sunset dates will be set for all internal rules. Only rules specifically justified will be put back in place after the sunset date.
- Agencies will have a two day "stand-down" of enforcement activities to deliver training to everyone in the agency on the consultative approach. Scheduling will maintain inspections in critical areas facing serious health or safety threats.

2. Assign our high impact players to high impact positions. Managers, the hammer award winners and others who have demonstrated success with the partnership approach should be reassigned to top positions in agencies drawing the greatest fire.
3. Revise current year spending plans so that more money is allocated to consultative efforts than to command and control efforts. Prepare plans to increase the consultative percentage in outyears.
4. Arrange Vice Presidential visits to agencies to collect the worst in current rules and regulations. Agencies would team up with customers to identify rules, paperwork and regulations that upset customers and add little value. These teams would be given hammers for solutions that simplify or dispose of the offending items.
5. Create an electronic, on-line "department of business." Here, in FedWorld for example, individual companies would find regulatory assistance, trade assistance, financial assistance, and a technical ombudsman to help them succeed.

Legislation, Rulemaking and Partnership

1. Handle major pending regulatory legislation (e.g., clean air) in consultative style, with alternatives to regulation emphasized and sunset dates established when all existing regulations under these statutes would lapse.
2. By executive order, mandate that all new regs must either simplify old regulations or implement new laws. Require too that all new regulations must be coordinated among all agencies dealing with a customer group.
3. For Regneg cases, relax the executive order limiting the number of FACA committees.
4. Develop approaches that avoid regulations altogether, allowing for major reductions in regulatory agencies. For example, create an independent, private sector certification of environmental quality that business would agree to use as their standard in purchases from suppliers. Government would only purchase from these certified companies. The model would be the ISO 9000 quality program now operating internationally. (ISO certification is almost a prerequisite for US firms trying to sell in Europe.)

VALIS ASSOCIATES

January 12, 1995

*at - I hoped that you
would be aware of this issue.
Decks*

The Honorable Sally Katzen
Administrator
Office of Information and Regulatory Affairs
350 OEOB
Washington, D.C. 20500

Dear ^{Sally} ~~Administrator Katzen:~~

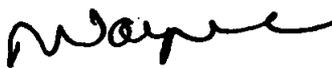
I am writing to request a brief meeting with you and the officers of RESPRO (see attached membership list), with whom you met during the early part of 1994.

As you can see from the enclosures, HUD has issued its proposed revisions to RESPA. This is causing great concern and distress among the real estate services provider community.

Over half of the home purchases in the United States are generated by RESPRO members, and HUD's proposed rules would make these purchases more difficult and costly for consumers. In light of the President's repeated emphasis on making government user-friendly and his announced goals to boost home ownership, we believe the HUD proposals are counterproductive.

Thanks for your continuing courtesy and cooperation. We look forward to meeting with you in the near future.

As ever,



Wayne H. Valis

enclosures

cc: The Honorable L. Panetta
The Honorable L. Tyson
The Honorable T. McLarty

The Honorable A. Mikva
The Honorable J. Quinn
The Honorable A. Herman

RESPRO

REAL ESTATE SERVICES PROVIDERS COUNCIL

2000 PENNSYLVANIA AVENUE, N.W. • SUITE 5500 • WASHINGTON, D.C. 20006 • (202) 887-1513

December 29, 1994

The Honorable Sally Katzen
Administrator
Office of Information and Regulatory Affairs
350 OEOB
Washington, D.C. 20500

Dear Administrator Katzen:

As you may remember, we met this summer when I represented the Real Estate Services Providers Council (RESPRO) in a meeting to discuss HUD's review of the 1992 Real Estate Settlement Procedures Act (RESPA) final regulation. Since that time, HUD has issued its proposed revisions to the federal rule. I write today to again urge that the Clinton Administration not limit the real estate consumer's choice to use the most cost-efficient and convenient means of buying a home. I would also like to request a meeting at your early convenience with RESPRO representatives to discuss RESPA.

As you know, RESPRO (material enclosed) is a nationwide coalition of diversified real estate services providers which promotes a federal and state regulatory environment allowing companies to offer diversified products and services for homebuyers and homeowners through affiliations, joint ventures and partnerships with other real estate providers. Our members strongly believe that the ability to offer multiple real estate settlement services benefits their consumers.

RESPRO has 79 member companies with offices located in all 50 states. Our members represent over 23,000 employees and 211,000 sales associates, and are responsible for closing over two million sales transactions annually (over half of all such transactions in the country). The services they offer include real estate brokerage, mortgage services, appraisals, title services, homeowners warranties and insurance.

On November 5, President Clinton announced a plan to boost homeownership to an all-time high by the end of the century. One of the key goals of the plan, according to the President, is to cut the costs and the regulations involved in buying a home.

HUD's latest RESPA proposal, however, would make it more difficult and costly for the real estate industry to offer one-stop shopping by dictating how diversified companies can compensate their own management and employees for promoting their multiple services to homebuyers.

Certainly, HUD regulations that dictate how certain companies compensate their own management and employees would not "cut the costs and regulations involved in buying a home." On the contrary, such regulations would significantly reduce cost efficiencies that could lead to lower prices and more competition.

Enclosed is a copy of RESPRO's comments to HUD on its proposed rule. Our comments address the rule's treatment of four issues: employee compensation, computerized loan origination systems, state preemption, and controlled business disclosure. We hope they will be useful as the Administration develops final RESPA regulations.

Again, I hope we will be able to arrange a meeting with you and RESPRO representatives to discuss these issues. We will call your office to request an appointment.

Thank you for your interest and consideration. Please let me know how RESPRO can be of help to you on this or other financial services issues.

Sincerely,



George T. Eastment
Executive Vice President, Long & Foster Real
Estate
Chairman of the Board, RESPRO

Enclosures

cc: J. Lackey
J. Morrall

BOARD MEMBERS

American Home Shield Corporation
Memphis, Tennessee

American Savings of Florida, F.S.B.
Miami, Florida

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THE REAL ESTATE SERVICES PROVIDERS COUNCIL (RESPRO)

Comments In Response To

THE DEPARTMENT OF HOUSING & URBAN DEVELOPMENT'S (HUD)

**Real Estate Settlement Services Procedures Act (RESPA)
Proposed Regulation**

Published July 21, 1994

**Docket No. R-94-1725
FR-3638-P-01**

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Woodland Hills, California

REAL ESTATE SERVICES PROVIDERS COUNCIL (RESPRO)

COMMENTS ON HUD'S PROPOSED RESPA RULE

As Issued on July 21, 1994

EXECUTIVE SUMMARY

BACKGROUND OF RESPRO

- o RESPRO is a nationwide coalition of diversified real estate services providers who united in 1992 to support a federal and state regulatory environment that allows companies to offer one-stop shopping for home buyers and owners in the most cost-efficient manner through affiliations, joint ventures and partnerships.
- o As of September 30, 1994, RESPRO's 74 members represent 23,387 employees and 210,492 real estate agents/sales associates, who engage in over two million settlement service* transactions annually from 8,365 offices in all 50 states.
- o RESPRO believes that a regulatory environment that will allow settlement service companies to offer one-stop shopping will provide home buyers and owners:
 - More convenience
 - Better service
 - More competition
 - Lower costs
- o RESPRO strongly supports HUD's 1992 final RESPA rule, because it (1) provided a clear regulatory framework under RESPA for the first time in a decade; and (2) allows settlement service providers to offer diversified products in the most cost-efficient manner.

* "Settlement service" as defined by HUD includes but is not limited to first and second mortgage lending/ brokerage, title services, legal services, document preparation, mortgage insurance, hazard insurance, real estate brokerage, homeowners warranties, appraisals and credit reports.

RESPRO'S POSITION ON HUD'S PROPOSED RESPA RULE

- o **RESPRO Opposes HUD's Proposal to Restrict Employee Compensation For the Generation of Business to Affiliates**
 - (1) HUD's proposed blanket withdrawal of the current employee compensation exemption reflects a fundamental misunderstanding of the purpose and history of the exemption, in that it repeals the only basis under RESPA for which employees can be paid incentive compensation (i.e., commissions to loan officers) by diversified or independent companies.
 - (2) HUD's proposed restriction on a diversified company's compensation to its own management for the generation of business to affiliates:
 - Deprive diversified companies of the very efficiencies needed to offer lower costs for home buyers and owners by preventing them from utilizing their own management to carry out their one-stop shopping objectives.
 - Go far beyond HUD's policy objective of reducing "adverse steering" by employees in a position of trust in relation to the home buyer or owner, since managers have no regular contact with consumers and are unable and/or unlikely to unduly influence those who are in a position of trust.
 - Are so vague that it effectively would stop all compensation to management for developing and implementing one-stop shopping programs.
 - (3) HUD's proposed prohibition on a diversified company's compensation to front-line employees for the generation of business to affiliates:
 - Places diversified companies at a competitive disadvantage to their independent competitors by preventing them from compensating salespersons (i.e., "financial services representatives") who offer more than one of the company's products or services in the same manner as their independent competitors.
 - Deprives diversified companies of the very efficiencies they need to lower costs for home buyers and owners by preventing them from using their base of employees who do not sell settlement services from promoting their employers' overall business.
 - Goes far beyond HUD's policy objective of reducing adverse steering by persons in a position of trust with the consumer by prohibiting incentive compensation for all salespersons regardless of whether the consumer is likely to be misled by a referral.

- o **RESPRO Recommends That If HUD Wants to Accomplish Its Policy Objectives Under RESPA, It Should:**
 - (1) Maintain the employee compensation exemption, but modify it to exclude any front-line agent or sales associate who is in a position of trust in relation to the consumer (or other person who assists consumers with the listing or purchase of a home), and who has regular and meaningful contact with consumers.
 - (2) Require that employees of all providers of settlement services who receive compensation under the employee compensation exemption -- independent and diversified -- disclose the amount of compensation they receive for selling settlement services.

- o **RESPRO Strongly Urges HUD to Use Its Authority to Preempt State Laws and Regulations That Unnecessarily Impose Restrictions on Diversified Companies That Neither Promote Competition Nor Protect Consumers**

- o **RESPRO Urges HUD to Modify Certain Proposed "Controlled Business" Disclosures**
 - (1) Those that are not required of a diversified company's independent competitors:
 - There is no justification for only requiring diversified companies to suggest that the customer may be able to get better or lower cost services through competitors and should consider shopping around.
 - A mandatory written acknowledgement of receipt of the disclosure imposes compliance costs that are not borne by a diversified company's independent competitors.
 - (2) Those that are impractical:
 - It is misleading to the consumer and unfair to persons referring business to disclose that they may receive a financial benefit from a referral when, in fact, they do not -- or even are prohibited -- from receiving a financial benefit.
 - A disclosure of the exact percentage of ownership interest in the affiliate would inhibit competition between providers that want to establish "controlled businesses" with other providers.
 - (3) Those that need to be clarified:
 - Time of referral: when the disclosure is required.
 - Disclosures when the referral is by telephone.
 - Disclosures when the referral is by mass media communications (billboards, brochures, television).

- How to disclose an estimate of charges that are based on a multitude of factors (i.e., insurance)

o **RESPRO Opposes HUD's Proposed CLO Exemption; Or, At a Minimum, Supports Significant Modifications and Clarifications**

- (1) Regulating payments by borrowers for CLO services constitutes a system of price controls for settlement service fees, which has been rejected by both Congress and the Courts.
- (2) If HUD chooses to subject payments by borrowers to RESPA:
 - HUD should eliminate the requirement that a borrower's payment be "outside of and before closing", which would deter the development of CLO technology.
 - HUD should reduce or eliminate the requirement that 20 lenders have access to the CLO system, which would slow down the CLO process, cause "information overload", and discriminate against small and local CLO operators
 - HUD should clarify the standard under which it will evaluate payments by borrowers for CLO services.

September 30, 1994

Rules Docket Clerk
Office of General Counsel
Room 10276
Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, D.C. 20410-0500

Subject: Docket No. R-94-1725; FR-3638-P-01

Dear Sir/Madam:

On behalf of the Real Estate Services Providers Council (RESPRO), I am pleased to comment on HUD's proposed amendments to Regulation X, the Real Estate Settlement Procedures Act (RESPA) regulation, as published in the Federal Register July 21, 1994.

BACKGROUND OF RESPRO

RESPRO is a nationwide coalition of diversified real estate services providers¹ who united in 1992 to support a federal and state regulatory environment that allows companies to offer one-stop shopping for home owners and buyers. RESPRO is open to diversified real estate services providers of all segments of the industry -- mortgage companies, real estate brokerage companies, title companies, insurance companies, financial institutions, and any provider of "settlement services" as defined by HUD under RESPA. RESPRO is also open to settlement service providers of all sizes, because even the smallest companies across the country are finding they can better meet their customers' needs by creating a relationship with a provider of related services.

Since its creation in 1992, RESPRO has grown from 12 to 74 members nationwide. As of September 30, 1994, RESPRO's members represent:

¹ "Diversified real estate services providers" are joint ventures, partnerships or affiliations between settlement service providers. Such business arrangements are referred to under RESPA as "controlled business arrangements", although RESPRO believes this term is a misnomer because diversified companies never control what their customers choose.

- o 23,387 employees
- o 210,492 real estate agents/associates
- o In 8,365 offices
- o Who engage in 2,008,609 "settlement service" transactions
- o In all 50 states

RESPRO strongly supports a regulatory environment that will allow companies to offer one-stop shopping for homebuyers in a cost-efficient manner through affiliations, joint ventures and partnerships with companies offering ancillary services (see Attachment 1). As Congress and HUD have recognized over the years, diversified companies have the ability to offer consumers numerous benefits:

- o Consumer convenience: Instead of being forced to use a different provider for each service, homebuyers have the option of obtaining all or part of the services at one time and/or one place
- o Quality of service: Homebuyers could obtain faster, better and more efficient service since the provider of one service could better assure the accountability of the provider of the other service.
- o Increased competition: By allowing companies to (1) diversify their product offerings; and (2) enter geographical markets they normally could not enter because of the costs of establishing separate branches and personnel for separate services, diversified companies increase competition in the real estate services marketplace.
- o Lower costs: Diversified companies are able to attain cost efficiencies (i.e., combined sales offices, combined back offices, employees performing multiple services) that can be passed along to homebuyers through lower prices.

A 1992 survey of title service costs in the Minneapolis-St. Paul marketplace found that diversified providers charge approximately \$13 less per closing for a market basket of title services (buyer's closing, plat drawing, assessment search, name search and record satisfaction) than independent providers.

The same report also found that after all diversified title service providers in Kansas closed down due to the 1989 law that restricted the ability of diversified providers to do business, base closing fees filed in Wichita County by independent title companies with the Kansas Insurance Commissioner jumped from \$125 to \$200 -- an increase of 60 percent (see Attachment 2).

RESPRO strongly supported HUD's final 1992 RESPA regulation, because:

- o It finally provided a clear regulatory framework after a decade of uncertainty over what was and was not allowed under RESPA

- o It provided a "safe harbor" for diversified real estate services providers under RESPA, allowed providers to "bundle" services at the point of sale, allowed providers to offer consumer discounts on bundled services, and allowed employers to compensate their own management and employees to develop and implement their one-stop shopping programs.

RESPRO expressed its strong support for the 1992 rule at HUD's August 6, 1993 hearing in Washington, D.C. (see RESPRO testimony in Attachment 3). RESPRO also intervened in the lawsuit brought by the Mortgage Bankers Association (MBA) and the Coalition to Retain Independent Services in Settlements (CRISIS) against HUD to challenge the 1992 RESPA rule. This lawsuit has been dismissed three times by the D.C. Federal District Court without prejudice.

RESPRO was not alone in its support for the 1992 final RESPA rule. We have enclosed a sample of news editorials and news articles published after the 1992 RESPA rule was made public that expressed strong support for the numerous consumer benefits provided by the rule (see Attachment 4)

HOW RESPRO DEVELOPED ITS POSITION ON HUD'S 1994 PROPOSED RULE

After the Department published its proposed RESPA rule on July 21, 1994, RESPRO conducted individual, in-depth interviews by telephone or in person with the senior management of 46 of its 74 members, who represent all parts of the settlement service industry throughout the country. The purpose of these interviews was twofold:

- (1) To determine the specific practices engaged in by diversified companies in, particularly with regard to employee compensation, and the reasons behind these practices.
- (2) To determine the concerns and priorities of each member with regard to this specific regulatory proposal.

These interviews with RESPRO members revealed the following:

- (1) First, diversified companies are employing an extraordinarily wide range of business structures and employee compensation practices.
 - o RESPRO members are expanding into ancillary services in a multitude of ways: through wholly-owned subsidiaries, divisions, common ownership, limited partnerships, joint ventures² and contractual relationships.

² Joint ventures and partnerships provide the same benefit to the consumer as affiliations, but allow separate companies (some without the expertise or desire to manage a full range of diversified settlement services) to participate together to integrate the service package. The partnership companies perform the duties related to their principle business function, in support of

- o RESPRO members engage or plan to engage in a broad array of compensation to management and employees for developing and implementing one-stop shopping programs:

Management Compensation

- Paying sales (branch) managers a bonus based on performance standards that include the amount of a customer's multiple purchases from the company and the company's increase in profits after implementing the programs
- Paying senior management a bonus based on performance standards that include the amount of a customer's multiple purchases from the company and the company's increase in profits after implementing the programs
- Compensating senior management based on the profits of the whole group of companies and/or individual companies
- Compensating branch management based on the profits of the whole group of companies and/or individual companies
- Offering management or employees the opportunity to purchase an ownership interest in the business
- Hiring and compensating a "financial services manager"-- a branch manager who is responsible for supervising the performance of the real estate agent, title agent, mortgage loan officer, etc.

the joint venture programs.

An example of the joint venture structure is a financial institution that joins with a real estate firm and a title company. The joint venture would be staffed with sales and with mortgage products, closing services and insurance services. The "parent" companies will provide non-front line support (secondary marketing, rate hedging, loan delivery, title and insurance underwriting). These are services not in the realm of the typical small, new or specialized company. The parent financial institution may be a GSE and HUD-approved lender, while it might take years for the new diversified company to reach the status. The consumer will benefit from lower costs available through direct access to these mortgage investors.

Both affiliated companies and joint venture arrangements provide numerous consumer benefits, and the participants can capitalize on their strengths and participate in the shared profits of their diversified services.

- Reimbursing sales (branch) managers for the administrative expenses of housing the affiliated settlement service employee

Front Line Employee Compensation

- Hiring and compensating on a commission basis a "customer services representative" or "financial services representative" (not a real estate agent) who markets more than one settlement service (not real estate brokerage) in a real estate office
 - Hiring and compensating on a commission basis a "customer services representative" or financial services representative (not a real estate agent) who markets more than one settlement service (not real estate brokerage) outside of a real estate office
 - Compensating employees (i.e., clerical help) based on profits of the whole group of companies and/or individual companies
 - Paying a non-settlement service employee (i.e., bank teller, account executive, telemarketing employee) a bonus for each transaction referred to a settlement service affiliate.
- o A diversified company's choice of a business structure or employee compensation practice depends on a multitude of factors:
 - The company's history
 - The local marketplace
 - The competition's practices
 - The personality of the owner
 - The type of ancillary business entered
 - The company's existing business structure
 - The company's existing businesses
 - State/local/federal laws and regulations

(2) Second, diversified companies are increasingly frustrated over their federal regulatory environment under RESPA. RESPRO members overwhelmingly commented that:

- o After HUD issued a final rule in 1992 that ended a decade of regulatory uncertainty, it almost immediately retreated, which stifled companies from developing one-stop shopping programs in the most cost-efficient manner.
- o Diversified companies are being singled out for criticism and regulation, while the most blatant RESPA violations (believed by

RESPRO members to be made overwhelmingly by independent competitors) are being ignored.

A Task Force of RESPRO Members reviewed the aggregate results of the interview findings and developed a recommended position, which was presented and approved by RESPRO's Board of Directors September 13, 1994. The following comments reflect this position.

RESPRO'S POSITION ON HUD'S PROPOSED RESPA RULE

Since HUD has consistently focused its review of its 1992 RESPA rule to four issues: (1) the employee compensation exemption; (2) preemption of state laws; (3) "controlled business" disclosure; and (4) computerized loan origination systems, RESPRO's comments will also focus on these four topics.

1. Employee Compensation Exemption

RESPRO strongly believes that HUD's employee compensation proposal:

- o Reflects a fundamental misunderstanding of the purpose and history of the employee compensation exemption.
- o Wrongly restricts compensation to managerial employees, which deprives diversified companies of efficiencies needed to offer lower costs to homebuyers, and goes far beyond HUD's policy objective of reducing "adverse steering", and is so vague and confusing it would have the effect of stopping all compensation to management for developing and implementing one-stop shopping programs in its tracks.
- o Wrongly prohibits compensation to front-line employees who are not in a position of trust with the consumer, which places diversified companies at a competitive disadvantage to their independent competitors, deprives diversified companies of efficiencies needed to offer lower costs to homebuyers, and goes far beyond HUD's policy objective of reducing "adverse steering".

RESPRO will explain these points in greater detail, and will offer proposed language to replace the proposed rule's language that would resolve our concerns.

HUD's Objectives in Restricting Employee Compensation

In addressing "controlled business" regulation in general, HUD attempts to balance two beliefs regarding diversified companies.

On the one hand, HUD recognizes that so-called "controlled business arrangements" and one-stop shopping may offer consumers significant benefits, including "reducing time,

complexity and costs associated with settlements"³. HUD is also concerned about "unduly interfering with the internal operations of controlled business arrangements"⁴.

On the other hand, HUD is concerned that the 1992 employee compensation exemption was too expansive and compromised the statute's purpose of protecting the consumer from "adverse steering" -- from being "referred for settlement services based on financial gain to the referrer, rather than on the highest quality and best price of the services"⁵.

In an attempt to balance these two concerns, HUD proposes to totally withdraw its longstanding exemption permitting employers to compensate their own employees for the generation of business to affiliates. This proposal is based on the assumption that the employee compensation exemption places diversified companies at a competitive advantage, and that "the market should produce incentives for the creation of controlled business arrangements without HUD authorizing incentive payments"⁶

After totally withdrawing the employee compensation exemption, HUD attempts to reinstate part of it because it realizes that it can't practically regulate all compensation to management and employees within diversified companies. HUD states that it wants to draw the line "at a point when that compensation has the greatest potential for overwhelming the other considerations that go into business referrals, e.g., long-term customer satisfaction."⁷

Therefore, HUD appears to allow certain types of compensation to managerial employees by only prohibiting employees who are not in "routine and direct contact with the customer" from accepting any payment from his or her employer "when that payment is correlated on a one-to-one basis or calculated as a multiple of the number or value of any referrals of business from his or her employer ... to an affiliated entity."⁸

However, HUD totally prohibits incentive compensation to persons who are routinely and directly in contact with the customer (front-line employees).

³ 59 Fed. Reg. at 37360,37361.

⁴ Id at 37362.

⁵ Id at 37362.

⁶ Id at 37362.

⁷ Id at 37362.

⁸ Id at 37362.

HUD's Employee Compensation Proposal Reflects a Fundamental Misunderstanding of the Purpose and History of the Employee Compensation Exemption

Congress enacted RESPA in 1974 to ensure that consumers (1) "are provided with greater and more timely information on the nature and costs of the settlement process"; and (2) "are protected from unnecessarily high settlement charges caused by certain abusive practices [i.e., kickbacks and referral fees] that tend to increase unnecessarily the cost of certain settlement services."⁹

To address the latter concern, Congress provided in Section 8(a) of RESPA that :

"No person shall give and no person shall accept any fee, kickback or thing of value, pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."¹⁰

However, Congress did not proscribe all payments for the referral of settlement services. There are several statutory exceptions¹¹ and several exceptions that flow from the language of Section 8 itself.¹² In addition, HUD has created several exemptions over the years.¹³ The employee compensation exemption was one of them.

⁹ 12 U.S.C. 2601(a) and (b).

¹⁰ 12 U.S.C. Section 2607(a). Section 8(b) of the Act, 12 U.S.C. Section 2607(b), also prohibits fee splitting between two or more persons other than for services performed. See e.g., Mercado v. Calumet Federal Savings and Loan, 763 F.2d 269, 270 (7th Cir. 1985).

¹¹ For example, payments to settlement service providers for the fair and reasonable value of services performed (not including the value of the referral) are excluded (12 U.S.C. § 2607(c)(1) and (2); 24 C.F.R. § 3500.14(g)(1) and (3)), as are referral fees between and among real estate brokers and agents under the so-called cooperative brokerage exemption (12 U.S.C. § 2607(c)(3)).

¹² For example, the wording of Section 8 does not proscribe referral fee practices between two divisions of a corporation since the divisions are not "persons"; only the corporation is a person. See 24 C.F.R. § 3500.2(a)(10).

¹³ HUD has created an exemption for "normal promotional and education activities," currently codified at 24 C.F.R. § 3500.14(g)(2)(i), that was based on various informal opinion letters; and an exemption for rebates to the purchasers of settlement services -- the so-called consumer rebate exemption. See e.g., Informal Opinion dated August 11, 1977 from Richard H. Heidermann ("A direct reduction to the consumer of a charge by a provider of settlement services does not fall under Section 8 of RESPA"); Informal Opinion dated May 23, 1989 from Grant Mitchell (providing title

HUD has held for over a decade that payments by employers to employees for the referral of business do not violate Section 8 of RESPA (see HUD informal opinion letters in Attachment 5). From a policy perspective, HUD has recognized that employees are supposed to generate the business desired by employers and the compensation paid by the employer for the generation of business is not the type of payment that was intended to be snared by Section 8's prohibition.¹⁴ From a legal perspective, HUD correctly determined that by requiring an "agreement or understanding" between two persons in Section 8, Congress intended that two distinct actors -- the person making the referral and the person receiving the referred business -- must be present for a violation of the law to occur.¹⁵ HUD reasoned that the action of an employee is not essentially distinct from the action of its employer and that an employer can only act through its employees.¹⁶ In these opinions, HUD was construing the concept of "agreement" or "understanding" exactly as it is construed in other laws utilizing the same terms.¹⁷

insurance and closing services at a reduced rate to particular entities does not violate RESPA). Although HUD rescinded all of its informal opinions with the publication of the 1992 rule, RESPRO believes that HUD still does not interpret RESPA so as to prohibit rebates to the purchasers of settlement services.

- ¹⁴ HUD Informal Opinion dated June 15, 1984 by Donald B. Alexander (collected in Attachment 5).
- ¹⁵ See e.g., Informal Opinion dated September 19, 1984 by Donald B. Alexander (collected in Attachment 5). See also, HUD's proposed RESPA regulation of 1988, 53 Fed. Reg. 17423, 17438 ("An agreement or understanding for the referral of business. . . does not include. . . a bona fide employment agreement. . . .")
- ¹⁶ See e.g., Informal Opinion dated September 19, 1984 by Donald B. Alexander (collected in Attachment 5).
- ¹⁷ See, e.g., Guzowski v. Hartman, 969 F.2d 211, 213 (6th Cir.) cert denied 113 S.Ct. 978 (1992) ("Section 1 [of Sherman Act prohibiting agreements in restraint of trade] does not reach conduct that is 'wholly unilateral' and does not reach agreements between the officers of a corporation and its employees"); Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313, 1316 (8th Cir. 1986) ("The inherent unity of economic interest and purpose which characterizes the relationship between a corporation and its officers, employees and wholly owned subsidiary precludes a finding of conspiracy between a corporation and certain agents"); Calculators Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1331 (9th Cir. 1983) (employers and their employees do not have the requisite degree of distinctiveness to conspire or agree under the antitrust laws); Holler v. Moore & Co., 702 F.2d 854 (10th Cir. 1993) (same); Tose v. First Pennsylvania Bank, 648 F.2d 879 (3d. Cir. 1981) (corporation and its officers cannot agree or conspire); Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (D.N.C., 1977) (same); Capitol Ice Cream

Significantly, HUD's development of the employee compensation exemption had nothing to do with controlled business arrangements. In fact, the first time HUD adopted this exemption was in a 1984 informal opinion letter that responded to a request as to whether a title company could not only compensate its employees, but also pay commissions to sales representatives that were independent contractors to generate title business. HUD responded that payments to an independent sales representative probably would violate RESPA, but that payments by a company to full time bona fide employees acting for their employers were not intended by Congress to violate RESPA.¹⁸ HUD reached a similar conclusion in another opinion letter that responded to whether a bank could compensate its employees who generated mortgage loans for the bank.¹⁹

The industry has relied on this employee compensation exemption over the years to permit lenders to pay loan officers on a commission basis for procuring loans; title agencies to compensate title officers or employees on a commission for procuring title insurance, and in fact, all settlement service providers (appraisers, insurance agents, pest control companies, etc.) for paying their employees on a commission basis for generating business for them.²⁰

HUD subsequently decided to apply the employee compensation exemption to controlled business arrangements. For example, 1986-1987 informal opinions by HUD employee Grant Mitchell allowed payments by various securities firms (such as Merrill Lynch) to their stock brokers and administrators for their efforts in sending customers to

Wholesales, Inc. v. Mid-Atlantic Coca Cola Bottling, Inc., 1982-83 Trade Cas. 21 65,067 (D.C. Cir. 1983) (group of employees not sufficiently distinct). See also Nexus Services v. Manning Tronics, 410 S.E.2d 810 (Ga. App. 1991) (corporate president did not interfere with contact between company and plaintiff because president acted as corporate agent of company; Combined Investment Services v. Scottsdale Ins., 477 N.W.2d 82 (Wis. App 1991) (to same effect).

¹⁸ See Informal Opinion dated June 15, 1984 by Donald B. Alexander collected in Attachment 5.

¹⁹ See Informal Opinion dated September 19, 1994 by Donald B. Alexander collected in Attachment 5.

²⁰ Contrary to the current HUD Administration's views, this type of compensation is not justified under Section 8(c)(1) or (2)'s exemption for payments or services actually performed because HUD has historically made clear that the value of the referral (i.e., the value of any additional business obtained by the employee) is not to be taken into account in determining whether the payment exceeds the reasonable value of goods, facilities or services. Compensation paid to loan officers and other settlement service employees for procuring business is based primarily on a referral (see Attachment 6).

affiliated mortgage lending subsidiaries.²¹ In 1988, HUD utilized the employee compensation exemption to approve a program in which employees of a relocation company owned by Weyerhaeuser were paid for their work in promoting and referring customers to Weyerhaeuser Mortgage.²²

Thereafter, HUD's informal opinions on this issue began to shift back and forth, depending on whether HUD thought the conduct for which the employee was being compensated was deemed to be in the "scope of the employer's employment".²³

In April 1989, HUD's General Counsel's office for the first time took the position that the payment of a bonus to a mortgage banking employee by his mortgage banking employer for the generation of business to a title insurance affiliate could never be in the employee's scope of employment and therefore violated Section 8 of RESPA.²⁴

This new position by HUD's General Counsel's office caused great debate within HUD and the Administration as HUD prepared a final RESPA rule to implement the 1983 "controlled business" amendments to RESPA. As a result of this controversy, HUD General Counsel Francis Keating asked the Department of Justice's (DOJ) Office of Legal Counsel in August 1991 whether HUD legally could exempt referral activities pursuant to a bona fide employment agreement, but prohibit controlled businesses from using that exemption. In a December 17, 1991 reply to Keating (see Attachment 7), DOJ said that HUD could not legally take this action. DOJ correctly observed that the controlled business exemption in Section 8(c)(4), established by 1983 amendments to RESPA, was not intended to proscribe conduct, but to establish a safe harbor under RESPA for controlled business arrangements. The DOJ memo also observed that HUD's concern -- that there was a possibility of subterfuge payments being made by the affiliate receiving the referral back to the employer -- was unwarranted since any such payments were already prohibited under Section 8. Accordingly, DOJ concluded that the proposed restriction was neither legal or necessary.

Before publishing the final rule, HUD once again sought Justice Department confirmation that the employee compensation exemption was permissible, since HUD's

²¹ See e.g., Informal Opinions dated August 29, 1985, January 21, 1986, and May 12, 1987 from Grant Mitchell, collected in Attachment 5.

²² Informal Opinion dated February 2, 1988 from Grant Mitchell, collected in Attachment 5.

²³ Compare Informal Opinion dated October 4, 1988 and December 28, 1988 by Grant E. Mitchell with Informal Opinion dated January 4, 1989 from Grant Mitchell and with HUD's proposed rule promulgated May 16, 1988 in which it defines "agreement and understanding" not to include "bona-fide employment agreement." See Attachment 5.

²⁴ Informal Opinion dated April 4, 1989 from Grant Mitchell, collected in Attachment 5.

General Counsel's office continued to believe a legal problem existed. The Department of Justice responded that HUD was well within the law in publishing the employer/employee exemption in the final rule.

In November 1992, HUD published its final RESPA rule with the following employee compensation exemption:

"Section 8 of RESPA does not prohibit an employer's payment to its own employees for any referral activities."²⁵

HUD's new proposed rule, however, would completely withdraw this employee compensation exemption. In so doing, HUD is proposing to repeal the only basis in its rule for permitting employees to be compensated for the referral of business by their employers in all companies -- independent and diversified.

HUD's Proposed Restrictions on Management Compensation (1) Would Deprive Diversified Companies of the Very Efficiencies Needed to Offer Lower Costs for Homebuyers; and (2) Go Far Beyond HUD's Policy Objective of Reducing "Adverse Steering"; and (3) Are So Vague They Effectively Would Stop All Management Compensation For Developing and Implementing One-Stop Shopping Programs.

If HUD prohibits or restricts compensation to managerial employees of diversified companies for the generation of business between affiliates, HUD would significantly decrease cost efficiencies within diversified companies by preventing them from utilizing their own management to carry out their one-stop shopping objectives.

Example: Company X owns Company A, a real estate brokerage company, Company B, a mortgage brokerage company, and Company C, a title agency. Company X decides it wants to offer one-stop shopping for homebuyers by offering Company B's and Company C's title services mortgages in Company A's real estate offices. As part of this effort, Company X houses Company B's mortgage loan officers and Company C's title agents in Company A's real estate offices.

Company X assigns the development and implementation of this one-stop shopping goal to its Vice President for Marketing. Because one of Company X's goals is to increase the amount of business conducted jointly by Companies A, B, and C, it makes performance of this objective one of the Vice President's performance standards, on which his or her annual bonus is based.

Company X also gives Company A's branch managers the responsibility of supervising the performance of Company B's loan officers and Company C's title agents. The branch managers' performance in supervising these employees is considered in determining the branch managers' annual bonus.

²⁵ Section 3500.14(g)(2)(ii).

Management compensation enables a company to carry out its objectives and mission. If a diversified company is not able to compensate its own management for their performance on behalf of more than one of its companies, it would have to hire more middle managers who are compensated for their performance on behalf of each company. This would either deter one-stop shopping programs or significantly reduce the cost efficiencies that HUD has recognized are possible.

Not only would HUD's proposed restrictions on management compensation deter diversified companies from effectively developing and implementing their one-stop shopping objectives, it would do so without even meeting one of its major policy objectives -- to reduce "adverse steering".

HUD's concern over adverse steering appears to lie with the real estate sales associates' position as trusted advisors to consumers in that they are in "a powerful position to make settlement service recommendations"²⁶. In its preamble to the proposed rule, HUD stated, "The central argument raised by numerous commenters... was that referral payments [compensation to employees for the generation of business to affiliates] were a breach of trust of prospective home purchasers, particularly in transactions involving real estate agents and affiliated companies..."²⁷

In fact, all the comments HUD appeared to rely upon to justify the blanket withdrawal of the employer-employee exemption only referred to potential abuses if a real estate agent is compensated for referrals to an affiliated company. For example, HUD placed particular emphasis on the combined comments of attorneys general of several states, who stated, "Consumers expect to be treated fairly by their real estate agents and therefore trust that a referral to a settlement service provider is based solely on their agent's knowledge of comparative prices and service features. When there was no compensation for the [real estate agent], consumers were justified in thinking that they were referred to a settlement service provider because that provider offered good service at a reasonable price, not because the agent received a payment in exchange for the referral. This is not longer the case."²⁸

HUD also relied on the comments of the Consumer Federation of America (CFA), who stated, "The CFA noted that the consumer has traditionally relied for assistance on the real estate broker (who is normally an agent of the seller) a person in a "highly privileged position of influence over the consumer."²⁹

HUD's proposal to restrict management compensation for the generation of business to affiliates clearly does not promote its policy objective of preventing "adverse

²⁶ HUD's Regulatory Impact Analysis (RIA) on its July 21, 1994 proposed RESPA rule at page 2.

²⁷ 59 Fed. Reg. at 37363.

²⁸ Id.

²⁹ Id.

steering" by employees who are in a position of trust with relation to the customer.

Managerial employees by definition have no regular contact with consumers, which significantly reduces their influence over consumers. Neither can managers of real estate branch officers unduly influence the real estate agent to refer customers to an affiliated company. Real estate agents are independent contractors, not employees, and are in no way controlled or directed by the branch manager. A branch manager of a real estate brokerage office who is compensated for the generation of business to affiliated companies tends to promote the affiliate's services by working with the affiliate to attract his/her agents' referrals by improving service and offering more appealing products.

Finally, HUD's proposed restrictions on management compensation are so vague that they effectively would prohibit diversified companies from compensating their management for developing and implementing one-stop shopping programs.

This does not appear to be HUD's intent. Based on statements in the preamble, HUD wants to permit some form of compensation "to managerial employees in controlled businesses for such purposes as the generation of business among affiliates..."³⁰ Yet, HUD's specific proposed language is not consistent with its intent.

HUD proposes that:

- (1) "No agent or employee" of any kind can receive any payment that is (a) "correlated on a one to one basis" to "the number or value of referrals to an affiliates" or (b) "calculated as a multiple of the number or value of referrals to an affiliate".³¹
- (2) No employee "who is routinely in direct contact with the public can get compensation based "in whole or in part" on the "number or value of referrals the employee or agent makes to affiliated entities."³²

How do these tests differ from each other? What type of compensation can a manager get that a front line employee can't? According to the rule, a front line employee cannot get compensated for his or her referrals in any way, shape or form. A manager cannot get compensated based on the calculation of affiliate referrals on a "one to one" basis or on the "multiple" basis. This appears to cover all compensation for the generation of business by more than one affiliate.

Nevertheless, Fact/Comment Illustration No. 11 in HUD's proposed rule states "Nothing in the RESPA rule prohibits bonuses or other compensation based, in part, on the generation of business by A (a lender) to B and C (a title company and escrow company) being paid to managerial employees who are not routinely in contact with customers."

³⁰ 59 Fed. Reg. at 37362

³¹ 59 Fed. Reg. at 37362.

³² Id.

RESPRO endorses Fact/Comment Illustration II, but cannot discern how its conclusion is reached from the text of the proposed rule. RESPRO cannot tell definitively whether the typical ways its members use employee compensation or want to use to measure the generation of business of more than one affiliate (see page 4) could be claimed to be a "multiple of the number or value of a referral."

Assuming HUD continues to decide to restrict management compensation in some way (a position with which RESPRO members strongly disagree). HUD needs to specify what forms of compensation constitute a "multiple of the number or value of referrals" and what forms do not. Further, HUD's fact/comment illustrations should specify and describe particular forms of managerial compensation that are acceptable and particular forms that violate the rule. Otherwise, regardless of whether HUD's rule is sensible or not, no one will be in a position to even follow it.

HUD's Proposed Prohibition on Compensation to All Front-Line Employees (1) Would Deter One-Stop Shopping By Placing Diversified Companies at a Competitive Disadvantage to Their Independent Competitors; (2) Deprive Diversified Companies of the Very Efficiencies Needed to Lower Costs for Homebuyers; and (3) Go Far Beyond HUD's Policy Objective of Reducing Adverse Steering

(1) **HUD's Proposed Prohibition on Compensation to All Front-Line Employees Would Deter One-Stop Shopping By Placing Diversified Companies at a Competitive Disadvantage to Their Independent Competitors**

HUD bases its proposed prohibition on compensation to front-line employees for the generation of business to affiliates on the assumption that the current exemption provides diversified companies with a competitive advantage over independent companies.

This is a fundamentally wrong assumption. By withdrawing the exemption for all front-line employees, HUD would prohibit incentive compensation to ordinary salespersons who are simply there to sell settlement services the same way a loan officer sells loans. As a result, HUD places diversified companies at a competitive disadvantage in the marketplace by preventing them from compensating their employees in the same manner as their independent competitors.

For example, the majority of RESPRO members who were interviewed concerning their present and intended business practices stated that in order to offer diversified products at the point of sale in the future, they would need to employ a salesperson who would market multiple settlement services (not real estate brokerage services) to their customers. As is traditional in the settlement services industry, RESPRO members want to compensate their salespersons on a commission basis. The following is an example of how this concept would work in the marketplace:

Financial Services Representative: Company X owns Subsidiary A, a real estate brokerage firm, Subsidiary B, a mortgage brokerage firm, Subsidiary C, a homeowners insurance firm, and Subsidiary D, a title

agency.³³ Company X decides that instead of offering the services of Subsidiaries B, C, and D through separate salespersons in separate offices, that it will establish a "Financial Services Center" in the offices of Subsidiary A at which one "financial services representative" (FSR) will market the services of Subsidiaries B, C, and D.

The Financial Services Center is open to all homebuyers, whether they use Company A's real estate brokerage services or not. In addition, Company A's real estate agents are not compensated directly or indirectly for referring business to the Financial Services Center, and therefore have no incentive to send their customers to the Center other than to ensure long-term customer satisfaction.

Because the Financial Services Center must compete both for Company A's real estate brokerage business and for outside business, Company X decides it needs to enhance the productivity of its FSRs by paying them on a commission basis based on the overall volume of mortgage, homeowners insurance, and title transactions.

HUD's proposal would prohibit Company X from paying its FSRs on a commission basis because such compensation would be considered to be for the generation of business to the affiliates of the FSR's employer (Company X).

This result places Company X at a competitive disadvantage to its independent mortgage, title, and homeowners insurance competitors. Settlement service providers (i.e., mortgage companies) follow the traditional practice of encouraging a salesperson's productivity by paying him or her on a commission basis. The most productive salespersons prefer to be paid by commissions as opposed to a base salary, because they know their overall compensation would be greater. Therefore, Company X would either have to hire less productive salespersons, or pay three separate employees to offer three separate services.

Prohibiting a diversified company from compensating its salespersons in the same manner as its competitors--merely because the salesperson offers more than one of the company's products or services -- inherently discriminates against diversified companies and one-stop shopping by preventing diversified companies from hiring the most productive salespersons.

Another example of how HUD's proposed prohibition on employee compensation would place diversified companies at a competitive disadvantage to their independent competitors follows:

³³ For the purpose of this and all other examples of employee compensation schemes used in these comments, the term "affiliate" applies to a company that is part of a corporation, joint venture, partnership, or under common ownership with another provider.

FSR of a Multilender CLO within a "Controlled Business":

Company X owns Subsidiary A, a real estate brokerage firm, Subsidiary B, a mortgage banking firm, and Subsidiary C, a CLO firm that hires financial services representatives (who are licensed mortgage brokers) to offer services through a multi-lender CLO that is "qualified" under HUD's proposed rule. Company X pays the FSRs who originate mortgages through the CLO system 50 basis points for each loan closed, no matter who the lender is. Subsidiary B, along with 19 other lenders, has been given access to the CLO under the same terms as the other lenders.

Under HUD's proposed rule, Company X may pay its FSRs 50 basis points for each loan closed through the other 19 lenders without HUD scrutiny, but may not pay its FSRs 50 basis points for each loan closed through Subsidiary B unless it can prove that the payment bears a reasonable relationship to the services provided (RESPA's "for services rendered" test).

Consequently, the proposed rule would discourage diversified companies with mortgage affiliates from creating or owning multi-lender CLOs, as well as discourage the existence of diversified companies by placing them at a competitive disadvantage to their independent providers.

(2) **HUD's Proposed Prohibition on Compensation to Front-Line Employees Would Deprive Diversified Companies of the Very Efficiencies They Need to Lower Costs for Home Buyers and Owners**

As reflected by the prior example, HUD's proposal to prohibit financial services representatives (FSRs) from receiving incentive compensation in effect would require a diversified company to use three FSRs to sell three separate services (so they can properly motivate the FSR) or to use one FSR (but not to compensate and therefore to encourage productivity.) Thus, HUD would deprive diversified companies of capitalizing on a cost efficiency they need to set up one-stop shopping programs that would benefit consumers.

Another way the rule would reduce cost efficiencies within diversified companies would be to preclude diversified companies unnecessarily from using their large base of employees (who do not sell settlement services for a living) from promoting their affiliates' settlement service business. Take the following example:

Non-settlement service employee: Bank X has a mortgage brokerage subsidiary, a title agency subsidiary, and an escrow subsidiary. Bank X and its subsidiaries make substantial expenditures advertising their companies and services. Bank X decides that it can reduce its advertising costs if it could get the employees of Bank X (i.e., bank teller, bank account representative and clerks) to promote the services of Bank X and its subsidiaries. Therefore, Bank X offers all such employees \$15 for each person they successfully refer to Bank X or its subsidiaries.

HUD's proposed rule would prohibit this type of compensation and consequently deny Bank X the ability to utilize its employees to promote its business in place of more costly advertising.

(3) HUD's Proposed Prohibition on Compensation to Front-Line Employees Goes Far Beyond Its Policy Objective of Reducing Adverse Steering

As discussed above, one of HUD's major public policy objectives in its proposed rule is to reduce "adverse steering" within controlled business arrangements. In its preamble, HUD bases its objective about "adverse steering" on concerns that certain front-line sales persons (i.e., real estate agents) are in a position of trust with relation to the consumer and therefore should not receive any financial incentive to refer the consumer to an ancillary service.

In the examples of front-line employees described above--financial services representatives, FSRs of a multilender CLO, and non-settlement service employees - the employees are salespersons who are not in a position of trust with relation to the customer in the same manner as a real estate agent.

HUD saw the difference between this type of salesperson and a real estate agent in the Regulatory Impact Analysis (RIA) accompanying its proposed rule:

"If well informed, the consumer could protect himself by not blindly trusting someone whose interests diverge from his own. For example, a consumer would expect a salesperson for a specific firm to push his or her firm's product and the consumer would maintain a healthy skepticism towards claims about such a product. The fact that the salesperson is employed (and rewarded) by a certain company alerts the consumer to be on guard concerning such claims about this or her company's products, or even (negative) claims about the products of others.

If someone is a trusted advisor, as is frequently the case in real estate transactions, this healthy skepticism may never arise and the consumer may receive and act on less than optimal recommendations given to earn a higher referral fee rather than given because it is best for the consumer. Even if the affiliated relationship is disclosed, the consumer may still expect the advisor to make recommendations in the consumer's interest, creating the opportunity for the trusted advisor to make recommendations the consumer believes are in his or her best interest but which, in fact, are not."³⁴

In prohibiting incentive compensation to ordinary salespersons, HUD's proposal goes much further than necessary to achieve its policy objective of preventing "adverse steering" by persons in a position of trust with the homebuyer.

³⁴ HUD's RIA at page 2-3 (emphasis added).

RESPRO's Recommendations Regarding The Employee Compensation Exemption

Based on these concerns, RESPRO recommends the following changes to HUD's employee compensation proposal:

- (1) RESPRO believes the employee compensation exemption should remain but be modified to exclude any real estate agent, sales associate, or other person who assists consumers with the listing or purchase of a home, and who has regular and meaningful contact with consumers (see Attachment 9 for language).

This approach achieve HUD's policy objective of preventing adverse steering by protecting from abuse relationships between the consumer and a person in a position of trust. At the same time, it would recognize the potential consumer benefits of diversified companies by (1) preserving cost efficiencies of diversified companies by allowing them to compensate their management and employees who are not in a position of trust for the generation of business among affiliates; and (2) assuring competitive equality between diversified and independent companies by allowing diversified companies to compensate their salespersons in the same manner as their independent competitors

- (2) RESPRO also supports a requirement that an employee disclose the amount of compensation that he or she receives for selling settlement services provided that the disclosure is required for employees of all settlement service providers-- independent and diversified alike (see Attachment 10 for language).

Attachment 11 contains a Fact/Comment Illustration that describes the affect of these suggested changes.

2. State Preemption

RESPRO Strongly Urges HUD To Use Its Authority To Preempt State Statutes That Unnecessarily Impose Restrictions On Diversified Companies That Neither Promote Competition Or Protect Consumers.

Although the 1992 final rule created for the first time a clear federal regulatory environment in which controlled business arrangements could clearly operate and flourish, many controlled business arrangements have been unable to do so. As mentioned earlier, part of the problem is that shortly after HUD created certainty with the 1992 final rule, it created uncertainty by its decision to reconsider the scope of the rule.

But even more of a deterrent than this uncertainty on the federal level is the fact that numerous state laws prohibit or severely restrict controlled business arrangements.

Many states have enacted laws that impose percentage limitations on controlled

business arrangements.³⁵ Many states have idiosyncratic rules that prohibit altogether particular controlled business arrangements.³⁶

The current motivation for the passage of these laws is purely "to protect the turf" of the currently entrenched providers from the additional competition that can come from controlled business arrangements.

If diversified companies have to comply with these varied and generally punitive state laws they either will not be established, or if established, will not be able to provide the anticipated one-stop shopping benefits for consumers. For example, after the Kansas state legislature imposed percentage limitations on the amount of business that title agents could obtain from their affiliates, diversified companies throughout Kansas had to divest their title agencies. Not surprisingly, a subsequent study concluded that after the imposition of this anti-controlled business rule, title premiums in Kansas increased dramatically. (See Attachment 2).

As illustrated by Kansas experience, anti-controlled business state laws hardly offer additional consumer protection. They do not require additional or more informative disclosure; rather, they simply limit the amount of business that can be obtained from an affiliated company without any showing whatsoever that these affiliations hurt consumers.³⁷ These laws also do not promote competition; rather, they prevent controlled businesses from effectively competing in the marketplace.

³⁵ In addition, the American Land Title Association (ALTA) has been urging the National Association of Insurance Commissioners ("NAIC") to insert a provision in its Model Title Insurance Agency Statute that would place a percentage cap on the amount of business a title company can obtain from an affiliate.

³⁶ For example, New Jersey's mortgage banking regulations prohibit lenders not affiliated with real estate brokers to take mortgage applications in such real estate brokers' offices, but impose onerous and expensive licensing requirements upon lenders affiliated with real estate brokers who want to take mortgage applications in the offices of their affiliated real estate brokers.

Virginia prohibits a person from acting as a mortgage broker in connection with a real estate transaction in which the mortgage broker or any person affiliated with the mortgage broker had acted as a real broker, [or will receive compensation in connection with the transaction] but grandfathers anyone licensed as a mortgage broker before February 25, 1989.

³⁷ Although ALTA has told various "anecdotes" about controlled business arrangements leading to huge title losses, ALTA has no hard evidence to substantiate this implausible contention. When pressed, ALTA admits that many of the losses did not involve controlled businesses and that others involved massive frauds resulting in criminal convictions in which the fact that a controlled business was of no importance whatsoever.

RESPRO strongly urges HUD to investigate these anti-competitively motivated state laws that are seriously retarding the ability of controlled business arrangements to provide consumers with the potential benefits that Congress and HUD have recognized. If HUD fails to act, controlled business arrangements and one-stop shopping will continue to be discouraged by state laws and regulations even under a clear federal regulatory framework that provides fair competition between diversified and independent competitors.

3. Controlled Business Disclosure

RESPRO supports RESPA's requirement that controlled businesses disclose their financial interest in a provider of services to which the customer is being referred, and inform the customer that he or she is not required to purchase a particular product in order to get another.

However, RESPRO has several major concerns about the particular disclosure requirements in HUD's proposed rule.

HUD Requires or Proposes to Require Disclosures by Diversified Companies That Are Not Required of Their Independent Competitors.

- (1) HUD's 1992 regulation required diversified companies to state in writing "You may be able to get these services or better services at a lower rate by shopping with other settlement service providers". HUD's proposed regulation goes further to say "and this is something you should consider doing". If HUD recognizes the benefits of controlled businesses and one-stop shopping, why should diversified companies be the only providers to tell their customers their competitors may be better, and even suggest they shop around? Why shouldn't independent companies have to tell their customers that they may be able to get better services by shopping with other settlement service providers, and that this is something they should consider doing?
- (2) The proposed rule also requires the customer to provide written acknowledgement of receipt of the disclosure. The majority of RESPRO's members already voluntarily attempt to get this written acknowledgment. However, a written acknowledgement would require diversified companies to expend considerable resources to assure complete compliance that their independent competitors don't have to expend. Moreover, compliance may not be possible in that some consumers simply forget to or do not return written acknowledgements -- particularly in transactions that are conducted by mail.

The solution would be to permit written acknowledgements of controlled business disclosures maintained by the referring party or the person receiving the referral to be conclusive proof that this disclosure obligation was satisfied so long as the acknowledgement is dated at or prior to the referral. In the absence of a written acknowledgement, a company could still prove that it provided a particular disclosure form and that it is their regular practice to do so.

Some of HUD's Required Disclosures Are Impractical and Should Be Eliminated.

- (1) HUD requires the "referring party" disclose in writing that he or she may get a financial or other benefit from the referral to the affiliated company. Such a

statement would be misleading to the consumer. The real estate agent making the referral cannot be paid any "thing of value" from anyone for a referral, including the real estate agent's company. Similarly, an affiliate making a referral to a sister company, or a subsidiary making a referral to a parent, does not get a financial benefit from the referral. Instead, the affiliate or parent company who receives the referral receives any financial benefit that may flow from the referral.

- (2) HUD also requires, for the first time, that the diversified company disclose the percentage of ownership interest in the affiliate. Many companies may decide to set up "controlled businesses" (i.e., joint ventures) with a different provider in each marketplace. The percentage of ownership interest in each arrangement depends on negotiations between the two providers. To disclose in writing (and therefore make public) the ownership interest of each arrangement would inhibit competition between companies who want to establish relationships with the same provider, and impede innovative business structures by standardizing the arrangement between providers.

HUD Needs To Clarify Some of Its Disclosure Requirements.

- (1) HUD requires that the disclosure must be provided on a separate piece of paper at or no earlier than 3 business days before each referral. This disclosure requirement would be extremely difficult to comply with unless HUD provides more clarification. For example, when is the referral? Does a referral occur when a real estate agent gets a pre-qualification for a customer--which often does not lead to a transaction? Moreover, how can one know when 3 business days before the referral occurs, when one doesn't know when the referral will be until it is made? If a referring party gives the required disclosure (which informs the customer of the affiliated business) 3 days before the referral, isn't the referring party making the referral by providing the disclosure?
- (2) HUD also needs to clarify:
- o How to provide disclosure when making referrals by telephone
 - o That disclosure does not have to be made in mass media communications (billboards, brochures, television)
 - o How to disclose an estimate of charges when the range of charges for the service varies according to a multitude of individualized criteria (i.e., insurance)

4. Computerized Loan Origination Systems

RESPRO believes that the CLO exemption in the proposed rule should be withdrawn since payments by borrowers to settlement service providers are not subject to RESPA. In the alternative, HUD should modify the criteria for the qualified CLO exemption and clarify the standard under which borrower payments to non-qualified CLO's will be reviewed.

HUD's Legal Framework For Analyzing CLO Payments By Borrowers Under Section 8(b) Is Inconsistent With Congressional Intent and Established Case Law

HUD alleges in its proposed rule that Section 8(b) of RESPA prohibits a CLO operator from accepting a payment from a borrower "other than for services actually performed."³⁸ This assertion is incorrect.

Section 8(b) provides:

"(b) Splitting Charges.

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan, other than for services actually performed."³⁹

Section 8(b), which is directed at unfair fee splitting, requires at least two parties "to share or split fees."⁴⁰ A borrower pays a CLO provider a fee for CLO services. The borrower does not get a "portion, split, or percentage" of the fee. Thus, whether the charge is fair or unfair, borrower payments to CLO's do not involve fee splitting or sharing. Accordingly, section 8(b) does not apply to borrower payments for CLO services.

In fact, if HUD's allegation was correct, Section 8(b) of RESPA would be nothing more than a price control provision which could be invoked whenever customers thought they were overcharged or poorly serviced in connection with a settlement service. Both Congress and the Courts have expressly rejected this interpretation of RESPA.

For example, in Mercado v. Calumet Federal Savings & Loan,⁴¹ the plaintiffs claimed that certain loan charges were excessive and not earned by the lender, and therefore violated Section 8(b)'s prohibition against accepting any settlement charge other than for services performed. The district court dismissed the suit, and, after conducting a careful analysis of the statute and its legislative history, the Court of Appeals affirmed. First, the Court of Appeals concluded that RESPA was not intended to govern the fairness of fees charged by settlement services providers. In particular the court stated "Congress considered and expressly rejected a system of price control for fees; it concluded the price of real estate services should be set in the market."⁴² Second, the court recognized that

³⁸ 59 Fed.Reg. 37368.

³⁹ 12 U.S.C. Section 2607 (b) (emphasis added).

⁴⁰ Mercado v. Calumet Federal Savings & Loan, 763 F.2d 269, 270 (7th Cir. 1985).

⁴¹ 763 F.2d 269 (7th Cir. 1985).

⁴² Id at 269. In this regard, the court referred to S. Rep. No. 866, 93rd Cong. 2d Sess. reprinted in 1974 U.S. Code Cong. & Admin. News 6546, 6549-50. It demonstrates that Congress expressly rejected exercising control over settlement service rates because this type of activity would have to involve a large federal bureaucracy in order to establish fair and reasonable prices. If

as an anti-kickback statute, section 8 of RESPA required at least two parties to share or split fees.⁴³ Looking at the alleged overcharge, the court could not see the presence of "any other person involved in the kickback or fee splitting source," and it therefore affirmed the dismissal of the RESPA claim.

This exact analysis was again confirmed only months ago when the Court of Appeals for the Seventh Circuit reiterated that overcharges to consumers for settlement services do not give rise to a cause of action under RESPA.⁴⁴

Since borrower payments to CLOs cannot be challenged under Section 8(b) of RESPA as HUD alleges, there is no need to attempt to exempt certain borrower fees to CLO's from RESPA scrutiny. All such fees are exempt.

If Borrower Payments For CLO Services Were Subject to RESPA, HUD Should Modify The Proposed Definition Of CLO System And The Criteria For A "Qualified" CLO Exemption

(1) **HUD's Proposed CLO Definition Has Caused Confusion.**

In surveying RESPRO members, we determined that confusion about HUD's proposed definition of the term "CLO system" exists in two areas.

First, many RESPRO members expressed concern that the rule would apply to computers or lap-tops that lenders, loan officers or mortgage brokers use to originate loans (often for a single lender or a small number of lenders) when no fee is paid for use of the computer, except in the sense that if the borrower ultimately obtains a loan, an origination fee will be paid, a part of which could be claimed to defray the expense of computer use.

RESPRO believes that HUD did not intend for the CLO rule to apply in this

borrower charges are subject to Section 8(b) of RESPA, that is exactly what will be needed at a time when HUD's resources are so strained that it cannot even decide all the RESPA issues before it, much less decide when CLO fees are fair or unearned.

⁴³ Id at 270. The Court distinguished and limited its prior decision in United States v. Gannon, 684 F.2d 433 (7th Cir. 1981) (en banc) See 763 F.2d at 271. Gannon involved an unusual situation in which a computer attendant of a Cook County title registration office demanded and accepted gratuities for recording changes of title. As the Mercado courts explained, this overcharge was held to be a RESPA violation on the fiction that the attendant in his official capacity solicited and kickbacked fees to the attendant in his individual capacity thus constituting a split or kickback upon a third party. See Mercado, 703 F.2d of 261.

⁴⁴ Durr v. Intercounty Title of Illinois, 14 F.3d. 1183, 1186-89 (7th Cir. 1994).

situation. Instead, RESPRO believes that borrower payments to CLO providers are only meant to capture specific payments for the purpose of obtaining access to a CLO, separate and apart from any origination fee. We suggest that HUD clarify this point. (See Attachment 12 for proposed language).

Second, it is unclear whether HUD's proposed CLO definition includes so-called computerized loan information systems ("CLIs"), which provide rate and term information about various lenders' loan products, compute monthly payment schedules, and select suitable loan products, but do not communicate electronically the loan application to the lender or otherwise "originate" the loan, as a CLO does. This issue needs to be clarified. RESPRO members do not have a uniform view on the appropriate resolution of this issue.

(2) The Criteria For A Qualified CLO Exemption Need To Be Modified

The requirement that a borrower's payment for CLO services be made "outside of and before closing" will significantly reduce the market for CLO services and deprive consumers of the opportunity to sample multiple lender CLOs

The mortgage lenders that have challenged the 1992 final rule's CLO exemption have long feared the competition that CLOs could bring to the loan origination market. Their latest tactic has been to argue that CLO services must be paid "outside of and before closing", in contrast to the way every other settlement service is paid.

HUD and the Consumer Federation of America (CFA) surprisingly appear to have accepted this "line" under the rationale that it will force consumers to consider seriously whether the CLO services are worth the money that will be asked. However, this requirement will have no other effect than to seriously dampen, if not destroy, the market for CLO services -- exactly the goal sought by the final rule's CLO opponents.

For example, it is unrealistic that a consumer will pay a CLO provider \$250 on the spot, or any time before closing, when competing mortgage brokers will be urging the consumer not to use the CLO -- i.e., "I represent 20 lenders myself; I can find you a loan just as well as a CLO, and you don't even have to pay me unless I do and unless that loan closes." By mandating that CLO or CLI access fees be paid "outside of and prior to" closing, HUD destroys the ability of CLO operators to offer this contingency form of payment.

As a consequence, CLO systems would be at a competitive disadvantage to their competition, which would deter their formation and prevent consumers from obtaining the benefits of this technology.

The requirement that 20 lenders must be on the CLO system needs to be changed.

Unlike the computerized airline reservation system marketplace, there are no barriers to entry to forming CLOs. Therefore, the market is the best arbiter of how many lenders it is desirable to have on a CLO system.

If HUD does choose to require a minimum number of lenders, RESPRO Members who are CLO operators uniformly believe that 20 lenders would slow down the CLO process, cause "information overload", and discriminate against small and local CLO operators. In addition, it is unclear that if a CLO operator believes five lenders represent the best package of lenders to offer consumer (i.e., they consistently have the best combination of service and low rates), why that operator should have to go the expense and effort to get 15 more lenders as surplusage. If the CLO operator is wrong in its judgment of which lenders should be on the system, the market and consumers will speak loudly and swiftly.

Regardless of the required minimum number HUD chooses, HUD needs to clarify what it means by "lender". Many lenders on CLO systems are and/or will be mortgage brokers or wholesale lenders who have access to and are promoting the rates and products of dozens of retail lenders. Is such a lender, one lender, or as many lenders as it is representing?

If Borrower Payments for CLO Services Were Subject To RESPA, HUD Should Clarify The Standard To Which Borrower Fees To Non-Qualified CLOs Would Be Subject.

HUD states in the preamble "[CLO] systems that fall outside the exemption would have to meet the basic test of RESPA that borrower payments be for the market value of the goods or services provided. If the payment does not meet the test, the excess is not for services or goods actually performed; it is unearned.⁴⁵ As provided in the 1992 final RESPA rule, this "for services rendered" test is very exacting: The payment must bear a reasonable relationship to the market value of the goods or facilities actually furnished or for services actually performed. If the payment is greater than the level of services or goods provided, the excess is unearned and violates RESPA.⁴⁶ Later in the preamble, however, HUD states in the absence of a CLO exemption, "payments by a borrower to a CLO operator are subject to scrutiny to determine whether the payment is a sham or a duplicative charge, rather than a payment for goods or facilities actually furnished.⁴⁷ This "sham or duplicative charge" test is different than the test for whether payments bear "a reasonable relationship" to the market value of the services performed.

For example, if five CLO providers provide real and substantial CLO services (i.e., displaying rates and terms of multiple lender products; evaluation of such loan products; related loan counselling; calculation of various monthly payment programs for different types of loans; transmitting borrower information to lender; etc.) and four of the lenders charged \$200 for their services and the fifth charged \$400, none of the lenders would have performed duplicative or sham services". However, the fifth lender arguably has charged a fee that does not bear a reasonable relationship to the market value of the

⁴⁵ 24 C.F.R. Section 3500.14(g)(3).

⁴⁶ 59 Fed. Reg. 37362.

⁴⁷ 59 Fed. Reg. at 37368.

services provided. Assuming HUD goes forward with the rule as proposed, it must clarify what the standard is -- "reasonable relationship" or "non-sham service." In doing so, HUD should keep in mind that if the standard attempts to prevent providers from charging a premium over perceived market value, neither HUD nor the CLO provider will have a feasible way to make this determination; and if the standard merely concerns a question of whether sham or duplicative services have been provided, very few providers will care or even attempt to qualify for a CLO exemption.

RESPRO appreciates the opportunity to comment on this vitally important regulation.

Sincerely,

Susan E. Johnson
Executive Director